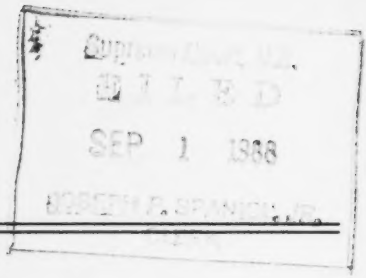
(1)

88-387



No. _____

IN THE

Supreme Court of the United States

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,
Petitioner,

vs.

LUCRECIA HERNANDEZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of The State of Florida

LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 29th Floor
Cleveland, Ohio 44114
(216) 523-6918
Counsel of Record for Petitioner
Alcan Aluminio do Brasil, S.A.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTION PRESENTED

1. Did the Florida Court err in holding that *in personam* jurisdiction was exercised in accordance with the Due Process Clause of the United States Constitution on Petitioner who is a foreign national, does not exist in the United States and who designed, manufactured, sold and delivered its products outside of the United States?

II.

RULE 28.1 STATEMENT

Petitioner is a Brazilian corporation and has no United States subsidiaries. However, Petitioner does participate in the ownership of two foreign corporations which are the following:

Mineracao Rio do Norte, S.A.,
Rio de Janeiro, R.J., Brasil

Petrocoque S.A.—Industria e Comercio,
Cubatao, S.P. Brasil

Petitioner is a wholly owned subsidiary of Alcan Aluminum Limited, a Canadian corporation.

TABLE OF CONTENTS

Question Presented I

Rule 28.1 Statement II

Table of Contents III

Table of Authorities..... VII

Opinions Below..... 1

Jurisdiction..... 2

Constitutional Provision..... 2

Statement of the Case..... 3

Reasons for Granting the Writ..... 6

I. This Case Presents An Important International Issue Left Unresolved By *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County,* Which Is Whether A Non-Domiciliary Foreign National May Be Reached By U.S. Courts For Sales Of A Finished Product In Its Own Country Which It Had Reason To Know Would Be Coming To The United States 6

II. This Court Should Review This Case Because The Issue Of The Exercise Of Jurisdiction By U.S. Courts Across International Boundaries Involves Sensitive Issues Of Foreign Relations And The Actions Of The Florida Courts Do Not Appear To Appreciate That Sensitivity. Quite To The Contrary, The Florida Courts

Appear To Be Aimed At Exacerbating The Already Serious Burdens Faced By Foreign Nationals Who Must Defend A Case In A Country In Which They Do Not Exist 8

III. This Court Should Review This Case Because This Case Presents The Court With Another Constitutional Issue Of First Impression Which Is Whether, Even If The Exercise Of Jurisdiction Is Proper, The Foreign Commerce Clause Of The United States Constitution Bars The Application Of State Law 11

IV. This Court Should Review This Case Because It Involves Important Issues For U.S. Citizens Who Might Find Themselves Subject To Suit In Foreign Jurisdictions In Which They Are Not Domiciled..... 13

V. This Court Should Review This Case Because It Involves An Important Issue Concerning The Issue Of Whether Manufacturers Will Be Discouraged From Undertaking Voluntary Safety Related Measures 14

Conclusion..... 16

Appendix:

Order of the Supreme Court of Florida, Declining to Exercise Discretionary Jurisdiction (June 21, 1988) A1

Order of District Court of Appeal of Florida Denying Rehearing and Clarification (May 17, 1988) A2

Order of District Court of Appeal of Florida Affirming Decision of Lower Court (March 29, 1988) A3

Order of District Court of Appeal of Florida Denying Motion for Reconsideration (January 20, 1988) A4

Order of District Court of Appeal of Florida Denying Motion to Appeal Pro Hac Vice A5

Order of the Eleventh Judicial Circuit of Florida Denying Motion for Summary Judgment on the Matter of In Personam Jurisdiction A6

Order of U.S. District Court Denying Motion to Dismiss (January 23, 1986)..... A8

Complaint: Lucrecia Hernandez v. Alcan Aluminio Do Brasil, et al., Eleventh Judicial Circuit Court of Florida, (July 15, 1985) A13

Motion to Dismiss Action..... A20

Renewed Motion for Summary Judgment..... A27

Appellant's Brief filed in the Court of Appeal of Florida..... A37

Petition of Lawrence A. Salibra, II, for Leave to Appear Pro Hac Vice..... A48

Asahi Metal Industry Co., Ltd. v. Superior Court of California; Brief of Amicus Curiae Alcan Aluminio Do Brasil, S.A., In Support of Petitioner A50

Motion for Reconsideration of Order Denying Petition to Appear Pro Hac Vice A61

Notice of Waiver of Oral Argument A64

Motion for Rehearing and to Clarify Decision by Written Opinion A66

Application for Discretionary Review of The District Court of Appeal, Third District of Florida, to the Supreme Court of Florida A69

Proposed Legislation: *Equal Access to Justice Act of 1987*, Senate Bill 1996, H.R. 3662 ..... A80

TABLE OF AUTHORITIES

Case Law:

Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County, 107 S. Ct. 1026 (1987) 4,5,6,7,8,9,11,13
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 6
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 12
Maschinenfabrik Seydelmann v. Altman, 468 So. 2d 286, (Fla. Dist. Ct. App. 1985) 5
Phillips Petroleum v. Shutts, 472 U.S. 797 (1985) ... 11
Ramonita Andino, et al. v. Alcan Aluminio do Brasil, S.A., 652 F. Supp. 415 (D. Puerto Rico, 1987) 7,12
United States v. First National City Bank, 379 U.S. 378 (1965) 8

Constitution:

United States Constitution, Fourteenth Amendment 2

Congressional Material:

Proposed Legislation: *Equal Access to Justice Act of 1987*, Senate Bill 1996, H.R. 3662 12

No._____

IN THE

Supreme Court of the United States

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,
Petitioner,

vs.

LUCRECIA HERNANDEZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of The State of Florida

OPINIONS BELOW

There are no opinions in this case. The trial court denied Petitioner's motion to dismiss without an opinion. The Florida Court of Appeals affirmed the case without opinion. The Florida Supreme Court refused to exercise discretionary jurisdiction.

JURISDICTION

The order of the Florida Supreme Court refusing to exercise discretionary jurisdiction was entered on June 21, 1988. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional challenge in this case is under the Due Process Clause, Fourteenth Amendment, of the United States Constitution: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner, Alcan Aluminio Do Brasil, S.A. is a corporation organized and existing under the laws of Brazil. Its headquarters and principal place of business is in Sao Paulo, Brazil. Petitioner is engaged in all phases of the aluminum business. One of those businesses involved the design, manufacture, and sale of pressure cookers sold under the trade name "Rochedo".

Petitioner designs, manufactures, sells and delivers products in Brazil. Its products are sold both to domestic and foreign purchasers; however, all buyers buy and take possession of the Rochedo cookers in Brazil. Petitioner assumes no responsibility for the entry of the cookers it sells into the country of the foreign purchaser.

The Respondent in this case is a citizen of the State of Florida. She apparently purchased a Rochedo cooker from a local Florida retailer, who in turn had purchased the cooker from a U.S. wholesaler. The U.S. wholesaler would have purchased the cooker in Brazil from the Petitioner and arranged for its importation into the United States.

The Respondent claims that she was injured when a defect in the Rochedo cooker caused the cooker to explode and injure her. She did not sue the retailer or wholesaler of the cooker, and allowed the statute of limitations to run with respect to these potential defendants. Instead, she sued the petitioner.

This lawsuit was first filed in state court on July 15, 1985. (Appendix A 13.) The lawsuit was removed to federal court on diversity grounds since the respondent had initially alleged approximately $150,000 in damages. Petitioner had moved to dismiss the case for the lack of *in personam* jurisdiction. (Appendix A20.) The trial

court, prior to this Court's decision in *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County,* 107 S. Ct. 1026 (1987), denied the Petitioner's motion in an opinion which refused to acknowledge a difference in constitutional analysis when jurisdiction was to be exercised across international boundaries. (Appendix A6.)

Shortly after this Court's decision in *Asahi, Id.,* the Respondent made a motion in the federal court to defeat diversity jurisdiction by stating that the damages Respondent sought were, in fact, less than $10,000. As a result of this motion, the lawsuit was returned to state court. Petitioner then renewed its Motion to Dismiss for lack of jurisdiction predicated on this Court's decision in *Asahi, Id.* (Appendix A27.) The trial court denied Petitioner's motion without opinion. (Appendix A8.)

Petitioner exercised its right to take an immediate appeal. (Appendix A37.) Petitioner's attorney, who was admitted in numerous state and federal courts, moved to be admitted *pro hac vice.* (Appendix A48.) This was particularly cost effective since Petitioner's attorney had, in fact, represented Petitioner on this issue in numerous other courts and before this Court when Petitioner appeared as *Amicus Curiae* in *Asahi, Id.* (Appendix A51.) This motion was denied. (Appendix A5.)

A Motion for Reconsideration of the denial of the *pro hac vice* admission, requested that the Florida Court of Appeals state why the limited admission request was being denied. (Appendix A61.) The Court, however, again denied the request without stating its reasons. (Appendix A4.) Petitioner then was forced to

withdraw its request for oral argument, since the cost of preparing new counsel to argue the case would far exceed the amount of an adverse judgment. (Appendix A64.)

Subsequently, the Florida Court of Appeals affirmed the trial court on the merits without opinion. (Appendix A3.) Petitioner moved for reconsideration and requested that the Court of Appeals, even if it denied the request, write an opinion detailing its reasoning as to why the principles articulated by this Court in *Asahi, Id.*, did not apply to this case. (Appendix A66.) In addition, Petitioner asked the Court of Appeals to point out the difference between this case and *Maschinenfabrik Seydelmann v. Altman*, 468 So. 2d 286, (Fla. Dist. Ct. App. 1985), the only reported Florida case involving an attempt to reach a similarly situated foreign domiciled defendant, where the Florida Courts held that the exercise of jurisdiction was constitutionally improper. The Court of Appeals denied this motion without opinion. (Appendix A2.)

Petitioner then requested that the Florida Supreme Court exercise its discretionary jurisdiction to review this case. (Appendix A69.) The Florida Supreme Court declined to exercise jurisdiction and this petition for certiorari results. (Appendix A1.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT INTERNATIONAL ISSUE LEFT UNRESOLVED BY *ASAHI METAL INDUSTRY COMPANY, LTD. V. SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY,* WHICH IS WHETHER A NON-DOMICILIARY FOREIGN NATIONAL MAY BE REACHED BY U.S. COURTS FOR SALES OF A FINISHED PRODUCT IN ITS OWN COUNTRY WHICH IT HAD REASON TO KNOW WOULD BE COMING TO THE UNITED STATES.

In *Asahi, supra,* p. 4, for the first time since its landmark decision in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), this Court reached the limits of *in personam* jurisdiction when applied across international boundaries. In that opinion, this Court did not develop a bright line test that would give precise guidance as to when U.S. Courts would be prohibited from reaching across international boundaries and asserting jurisdiction on non-domiciliary foreign nationals. In fact, this Court's opinion posited many situations which it suggested may change its decision.

For example, it noted that the fact that a product was designed for the U.S. market might change the outcome of its analysis. The irony that this case presents is that while Petitioner is being subjected to U.S. jurisdiction, the basis for the alleged liability is that its design did not comply with contemporary United States design standards. However, the cooker did, in fact, meet the mandatory British standard. This situation suggests that jurisdiction was improperly exercised if a design criteria is used.

Additionally, this court suggested that the fact that *Asahi, supra,* p. 4, involved a component rather than a completed product may also have an impact on its

Constitutional analysis. Although Petitioner does not believe that distinction is one of significance, other courts have suggested that it does make a difference. This case presents the proper opportunity for this Court to address that issue directly.

A significant part of this Court's analysis in *Asahi, supra*, p. 4, also mentioned the fact that in that case Asahi was being sued by another defendant rather than the injured plaintiff. In this case, as contrasted with *Asahi, supra*, p. 4, the allegedly injured party chose to sue the foreign manufacturer directly, bypassing the local retailer. The issue now is whether that makes a difference.

Petitioner believes that the issue of jurisdiction should not turn on a plaintiff's selection of target defendants. A sister case to this case, *Ramonita Andino, et al. v. Alcan Aluminio do Brasil, S.A.*, 652 F. Supp. 415 (D. Puerto Rico, 1987), which was recently argued before the First Circuit and is presently awaiting decision, presents this issue in its most dramatic form. In *Andino, Id.*, the plaintiffs sued the Petitioner directly and obtained diversity jurisdiction. Simultaneously, certain of the plaintiffs sued the local Puerto Rican retailers and wholesalers in state court. The wholesaler and retailer then brought third-party actions against the Petitioner.

If, as at least some language in this Court's *Asahi, supra*, p. 4, opinion suggests, the status of the plaintiff that sues a foreign defendant makes a difference as to jurisdiction, there would be jurisdiction in the federal action against the Petitioner and no jurisdiction against the Petitioner in the state action. It is Petitioner's position that such a result makes little sense and that this case, in conjunction with Petitioner's sister cases, directly presents these issues to the Court for its direct review and consideration.

II. THIS COURT SHOULD REVIEW THIS CASE BECAUSE THE ISSUE OF THE EXERCISE OF JURISDICTION BY U.S. COURTS ACROSS INTERNATIONAL BOUNDARIES INVOLVES SENSITIVE ISSUES OF FOREIGN RELATIONS AND THE ACTIONS OF THE FLORIDA COURTS DO NOT APPEAR TO APPRECIATE THAT SENSITIVITY. QUITE TO THE CONTRARY, THE FLORIDA COURTS APPEAR TO BE AIMED AT EXACERBATING THE ALREADY SERIOUS BURDENS FACED BY FOREIGN NATIONALS WHO MUST DEFEND A CASE IN A COUNTRY IN WHICH THEY DO NOT EXIST.

In *Asahi, supra*, p. 4, this Court stated:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in its foreign relations policies, will be best served by a careful inquiry in the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Asahi, supra, p. 4, 107 S. Ct. at 1035, citing: *United States v. First National City Bank*, 379 U.S. 378, (1965) (Harlan, *J.*, dissenting).

Apparently, the Florida courts have not taken this Court's admonition seriously. This case involves the exercise of jurisdiction over a foreign domiciled defendant who designed, manufactured, sold and delivered its product in its own country. It is not a case

where the exercise of jurisdiction by a U.S. court is *obviously* appropriate. It is a case where careful inquiry is required. The Florida court's action does not indicate the presence of such an inquiry.

In a series of briefs, Petitioner detailed its reasons why the principles promulgated by this Court in *Asahi, supra*, p. 4, would dictate the same result in this case. For example, Petitioner demonstrated that the Respondent had adequate remedies available to her without the need for the exercise of transnational jurisdiction. We detailed the absence of minimum contacts. In short, we made a good faith effort to undertake the very reasoned analysis this Court has stated was required by these cases. Petitioner believes the Florida courts' lack of response indicates their failure to undertake the same reasoned analysis.

Given the significance of the foreign relations issues and the fact that Florida's actions would necessarily be scrutinized by the Brazilian courts who would be required to undertake to enforce their judgment, common sense would dictate that the Florida courts would want to point out the failings of our logic, and demonstrate to foreign authorities that their action was not taken without careful thought and consideration. At least, they would want to do this if, in fact, they could demonstrate weaknesses in our arguments.

In fact, the Florida court's conduct of failing to give any written opinion, especially when combined with preemptory abuse of its discretion in not admitting Alcan's counsel without explanation, certainly is not the type of conduct which would suggest to the United States' foreign neighbor that our judicial system treats matters involving their interests with considerations of fairness and due process. The Florida courts had no

rational basis to deny Alcan's counsel admission to press the interests of his client except one—to raise the already extreme burden on a foreign national's costs of litigation to prevent it from fully protecting its rights.

Petitioner's counsel was representing it on a matter that involved federal law. He had represented the Petitioner in numerous other courts on this matter, including this very case when it was being entertained in the Florida federal court. Since Petitioner was not even a Florida resident or citizen, the Florida court could hardly be heard to argue that it was concerned about protecting its citizens. One and only one explanation exists for the Florida Courts action and that explanation is that the Florida court was engaging in improper conduct.

III. THIS COURT SHOULD REVIEW THIS CASE BECAUSE THIS CASE PRESENTS THE COURT WITH ANOTHER CONSTITUTIONAL ISSUE OF FIRST IMPRESSION WHICH IS WHETHER, EVEN IF THE EXERCISE OF JURISDICTION IS PROPER, THE FOREIGN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION BARS THE APPLICATION OF STATE LAW.

It has already been recognized by this Court in *Asahi, supra*, p. 4, that the exercise of jurisdiction on a non-resident foreign national presents an additional question of whose law will govern the transaction:

> Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan.

Asahi, supra, p. 4, 107 S. Ct. at 1034, citing: *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

The issue in this case is not exactly the same as that quoted above. However, it reflects a transaction that undoubtedly occurs frequently, if not more frequently than the situation in *Asahi, supra*, p. 4. It involves the sale by a foreign manufacturer to a U.S. importer in the manufacturer's home country. Since all the activities of the manufacturer (the design, manufacture, sale *and* delivery of the product) took place in Brazil, the question arises as to whether an indirect U.S. customer may now, consistent with the Foreign Commerce Clause, seek to regulate under state law, activities which all took place in a foreign country.

Petitioner believes that the answer is clearly "no" under the principles which this Court enunciated in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). Our research indicates that this issue would be one of first impression.

Resolution of this issue would also have significant impact on the desirability of seeking the exercise of *in personam* jurisdiction. A significant reason why a plaintiff seeks to sue a foreign defendant in the United States is not simply the economic and practical disadvantages of a transnational defense, but also because they expect that the Court will apply U.S. law. This application often gives plaintiffs advantages that they would not have if the law of the foreign jurisdiction were applied. This principle has recently been recognized in proposed federal legislation which attempts to limit the action of foreign plaintiffs suing U.S. companies in the United States to the application of the law of the jurisdiction in which the accident occurred. Proposed Legislation: *Equal Access to Justice Act of 1987*, Senate Bill 1996, H.R. 3662. (Appendix A80.)

Although the application of U.S. versus foreign law issue is not directly presented in this case due to peculiar Florida procedure, the issue will ultimately arise in this case if the exercise of jurisdiction is found to be appropriate. Moreover, the issue was directly raised and is presently submitted for decision in the related *Andino* case, *supra*, p. 7, in the First Circuit.

IV. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT INVOLVES IMPORTANT ISSUES FOR U.S. CITIZENS WHO MIGHT FIND THEMSELVES SUBJECT TO SUIT IN FOREIGN JURISDICTIONS IN WHICH THEY ARE NOT DOMICILED.

The underlying practical consideration for the exercise of jurisdiction on a non-domiciled foreign national is whether the foreign judicial system will enforce a U.S. Court judgment. Without some assurance that a judgment is, in fact, enforceable, discussions of jurisdiction are of limited academic interest. Although this Court's decision in this case will shed little light on whether a particular nation's judicial system might enforce a U.S. judgment, its reasoning will give U.S. citizens, as well as those of other countries, considerable insight into whether U.S. Courts will permit the enforcement of foreign judgments against non-domiciled American citizens.

Consider, for example, the case of the duty free store at Dulles airport. Will this Court permit the enforcement of foreign judgments against it for selling defective merchandise? Will this Court expect it to defend itself around the world? Does the fact that it may advertise outside the United States to potential customers make a difference? In the *Asahi*, *supra*, p. 4, opinion, this Court raised many possibilities as to what may affect jurisdiction. The final answers to those questions are important to both U.S. and foreign citizens alike and this case provides this Court with the opportunity to answer many of those questions.

V. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT INVOLVES AN IMPORTANT ISSUE CONCERNING THE ISSUE OF WHETHER FOREIGN MANUFACTURERS WILL BE DISCOURAGED FROM UNDERTAKING VOLUNTARY SAFETY RELATED MEASURES.

These lawsuits have resulted from the publicity surrounding a voluntary recall campaign which was undertaken by the Petitioner after it had learned that some consumers had been injured by opening its cookers while under pressure. The U.S. importers who were aware of these injuries were not willing to undertake any action because they felt there was no liability. The injuries resulted from the consumers having ignored explicit operating instructions.

Although Petitioner agreed with its customer's analysis as to the cause of the accidents (*i.e.*, failure to follow the instructions), it decided to undertake a voluntary recall as a matter of corporate policy. Petitioner contracted to have a recall undertaken on its behalf. The question now before this Court is whether having undertaken this voluntary action, it had subjected itself to *in personam* jurisdiction in the United States. Petitioner believes that it did not. However, a decision that it did will have a detrimental impact on U.S. citizens who may well be deprived of beneficial conduct by many foreign companies.

Although Americans naturally admire their legal system, it must be recognized that the rest of the world may not necessarily share that admiration. Many foreign corporations would be reluctant to undertake a voluntary safety program directed at the United States if they believed that the consequence of the program would subject them to a jury trial and strict liability.

This is an important issue both from the perspective of U.S. citizens and foreign manufacturers who deserve to know with some reasonable measure of predictability the consequences of their actions.

CONCLUSION

It is not surprising that this Court would only recently consider the application of *in personam* jurisdiction transnationally. No doubt this reflects the significant change in the position of the United States to its role as coparticipant in an international economy. In many respects, trade among nations now proceeds with the same ease and speed with which trade has proceeded among the states. However, this ease should not lull the Court into forgetting that we are dealing here with other nations, not other states.

It is of critical importance that this Court establish rules of conduct as a guide to our international relationships. It is important that foreign nations and foreign nationals be able to predict with reasonable certainty the consequence their actions may have. This is particularly true where the actions could result in an attempt to force a foreign national to submit to a judicial system in which none of its allegedly offensive conduct took place, or where the conduct which the national took was in fact legally appropriate in the jurisdiction in which it occurred.

The pressing nature of the problem, the apparent unwillingness of certain state courts to acknowledge the seriousness of the problem, and the fact that this case and its related cases presents this Court with an opportunity to confront this problem dictates that this Court should review this case. It is especially unfair to allow non-resident foreign citizens to dangle in our Court system while we think about what the rules should be; it is certainly not a condition this Court would find acceptable for U.S. citizens.

Petitioner recognizes that some of the issues raised in this petition are not raised directly by this case; they are raised in related cases presently awaiting decision at the First Circuit. By the same token, some of the issues raised by this case are not directly confronted in the First Circuit cases. Moreover, it would be a considerable waste of judicial time and effort, not to mention the burden on the foreign Petitioner, to conduct a jury trial on a $10,000 issue only to find out upon review the effort need not have been expended.

Therefore, if this Court determines immediate review of this case is not appropriate, we would recommend to this Court that it note probable jurisdiction, pending resolution of the First Circuit cases. Petitioner believes that a delay in this case would be of little hardship to the Respondent, since her claim is for less than $10,000 and because there has already been considerable delay caused in large part by the Respondent's removal of this case from federal court where the trial judge had indicated to parties that a speedy trial date was imminent.

For the foregoing reasons, this petition should be granted and the case set for argument or alternatively, Petitioner prays that this Court enter a notation of probable jurisdiction pending resolution of the First Circuit cases.

Respectfully submitted,

LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 29th Floor
Cleveland, Ohio 44114
(216) 523-6918
Counsel of Record for Petitioner
Alcan Aluminio do Brasil, S.A.

APPENDIX

ORDER OF THE SUPREME COURT OF FLORIDA

(Dated June 21, 1988)

Case No. 72,602

SUPREME COURT OF FLORIDA

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Petitioners,

vs.

LUCRECIA HERNANDEZ,
Respondent.

District Court of Appeal,
3d District—No. 87-1697

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

ORDER OF DISTRICT COURT OF APPEAL OF FLORIDA DENYING REHEARING AND CLARIFICATION

(Dated May 17, 1988)

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Appellants,

vs.

LUCRECIA HERNANDEZ,
Appellees.

Upon consideration, appellant's, Alcan Aluminio Do Brasil, S.A., motion for rehearing and clarification is hereby denied.

ORDER OF DISTRICT COURT OF APPEAL OF FLORIDA AFFIRMING DECISION OF LOWER COURT

(Dated March 29, 1988)

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING MOTION AND,
IF FILED, DISPOSED OF.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Appellants,

vs.

LUCRECIA HERNANDEZ,
Appellee.

Opinion filed March 29, 1988.

An Appeal from a non-final order of the Circuit Court for Dade County, Joseph P. Farina, Judge.

Papy, Weissenborn & Papy, for appellants.

Stabinski & Funt and Marc L. Goldman, for appellee.

Before SCHWARTZ, *C.J.*, and BARKDULL and FERGUSON, *JJ.*

PER CURIAM.

Affirmed.

ORDER OF DISTRICT COURT OF APPEAL OF FLORIDA DENYING MOTION FOR RECONSIDERATION

(Dated January 20, 1988)

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Appellants,

vs.

LUCRECIA HERNANDEZ,
Appellee.

Upon consideration, appellants' motion for reconsideration of order denying the motion of Lawrence Salibra for admittance pro hac vice is denied.

A5

ORDER OF DISTRICT COURT OF APPEAL OF FLORIDA DENYING MOTION TO APPEAL PRO HAC VICE

(Dated December 18, 1987)

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

ALCAN ALUMINIO DE BRASIL, S.A.,
Appellant,

vs.

LUCRECIA HERNANDEZ,
Appellee.

Upon consideration, the petition of Lawrence Salibra for leave to appear and participate pro hac vice is denied.

ORDER OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA DENYING MOTION FOR SUMMARY JUDGMENT

(Dated July 7, 1987)

Case No. 85-07280 CA 23

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

LUCRECIA HERNANDEZ,
Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.,
a Brazilian corporation,
ALCAN ALUMINIUM, LTD.,
a Canadian corporation,
and ALCAN ALUMINIUM CORPORATION,
a foreign corporation,
Defendants.

ORDER ON ALCAN ALUMINIO DO BRASIL'S MOTION FOR SUMMARY JUDGMENT ON THE MATTER OF IN PERSONAM JURISDICTION

THIS CAUSE came on to be heard on Defendant, Alcan Aluminio do Brasil's Motion for Summary Judgment on the matter of in personam jurisdiction filed

May 20, 1987, and the Court after having heard argument of counsel and being otherwise fully apprised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

Defendant, Alcan Aluminio do Brasil's Motion for Summary Judgment is hereby denied.

DONE and ORDERED in Chambers in Miami, Dade County, Florida on this 7 day of July, 1987.

JOSEPH P. FARINA
Circuit Court Judge

ORDER OF UNITED STATES DISTRICT COURT DENYING MOTION TO DISMISS

(Dated January 23, 1986)

Case No. 85-2729-CIV-SCOTT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LUCRECIA HERNANDEZ,
Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.;
ALCAN ALUMINIUM, LTD.,
a Canadian corporation;
and ALCAN ALUMINUM, CORP.,
a foreign corporation,
Defendants.

ORDER ON PENDING MOTIONS

THIS CAUSE is before the Court on the Defendants' Motion to Dismiss the Complaint for Lack of In Personam Jurisdiction and on Plaintiff's Motion to Compel Production. The sole issue before the Court regarding the jurisdictional challenge is whether "maintenance of [this] suit ... offend[s] traditional notions of fair play and substantial justice." *Burger King Corp. v. Macshara*, 724 F.2d 1505, 1508 (11th Cir. 1984).

As to the Defendant Alcan Aluminio Do Brasil, S.A., the Court answers the question with a resounding "no". The Court determines that the Brazilian company falls

within the reach of the Florida long-arm statute, Fla. Stat. 48.193, and that the exercise of that jurisdiction is constitutional within the ambit of the law.

Defendant sells its products to a Miami contractor. Therefore it is foreseeable that the product which is sold will be used here and that such product will injure people. In this Court's viewpoint, that belief was confirmed by the recall campaign which was instituted through the same independent contractors and jobbers the Defendant Alcan Aluminio Do Brasil, S.A. sold its products to. The Court makes a determination that the Defendant purposely directed its activities to the residents of Florida. In making these observations, the Court does so in an academic sense and not on the basis of the merits of the case which, at this time, it has no independent knowledge of or nor is that essential for the Court to resolve this issue presently before it.

The Court additionally notes that its decision is not contrary to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) which essentially involved an automobile distributor whose only tie to the forum was a customer's fortuitous decision to drive there, and is in accordance with the Florida Supreme Court's decision in *Ford Motor Company v. Atwood Vacuum Machine Co.*, 392 So. 2d 1305 (Fla. 1981). Trying to glean the intent and direction of the courts, this Court has reviewed these decisions including the previously referred case of *Burger King Corp. v. Macshara*, 724 F.2d 1505 (11th Cir. 1984), *rev'd sub nom. Burger King Corp. v. Rudzewicz*, _____ U.S. _____, 105 S.Ct. 2174 (1985) as well as *Calder v. Jones*, _____ U.S. _____, 104 S.Ct. 1482 (1984) and *Keeton v. Hustler Magazine*, _____ U.S. _____, 104 S.Ct. 1473 (1984). This Court makes a factual and legal determination that this case is not in conflict with that authority but in accordance with it.

Here, the Defendant purposely established contact with the forum state by selling its products to sales companies knowing that in turn these products would be sold to Florida residents. As noted above, that activity was confirmed by the Defendant's later recall efforts. This Court is comfortable with its decision as to Defendant Alcan Aluminio Do Brasil, S.A. and, therefore, finds that jurisdiction is proper.

As to the remaining corporate Defendants, the Court is less enchanted with the Plaintiff's position and feels very strongly that she will not be able to establish jurisdiction, however, in an abundance of caution, Plaintiff shall have thirty (30) days from the date of this order, as issued in open Court, to establish jurisdiction regarding the Canadian and Ohio corporations.

Motion to Compel

The motion to Compel is GRANTED in part and DENIED in part as follows. Each Defendant, under oath, shall designate a company representative within twenty (20) days from today to answer the following interrogatories. If Defendants fail to do so, they will have to produce a company representative in Miami, Florida to answer the interrogatories within thirty (30) days. Each corporate Defendant shall answer the following questions.

Interrogatory #1

> "Please state the exact parent-subsidiary or co-subsidiary relationship between you and each co-Defendants."
>
> No subparts need be answered. (not relevant).

Interrogatory #2

GRANTED.

Interrogatory #3

GRANTED.

Interrogatory #4

GRANTED.

Interrogatory #5

Modified as follows:

"Please state the names of people presently or in the past three (3) years who were directors or officers of two or more of the corporations."

Interrogatory #6

Modified as follows:

"Please state the name of any directors, and officers who currently work for two or more of the Defendant corporations and what capacity they are employed."

(Directors and officers means "top people only", i.e. Board of Directors, vice-president, etc.).

Interrogatory #7

DENIED.

Interrogatory #8

DENIED.

Interrogatory #9

GRANTED.

Interrogatory #10

DENIED.

Interrogatory #11

DENIED.

Interrogatory #12

DENIED.

Request for Production of Expert's File

(1) Within sixty (60) days, Defendant shall produce the corporate representative who conducted the examination of the pressure cooker with his examination notes, pictures and things of that nature here in Miami, Florida.

(2) Conversely, in fundamental fairness, the Court *sua sponte* orders Plaintiff to produce her experts with his file for a deposition to be taken by the Defendant. This deposition will follow *directly* the examination of Defendant's expert. It makes no difference who examined the pressure cooker whether independent expert or in-house, the file(s) must be produced with the exception of any communication which is protected by some valid claim of privilege.

DONE and ORDERED in Open Court at Miami, Florida on the 23rd day of January, 1986.

/s/ THOMAS E. SCOTT
United States District Judge

COMPLAINT FILED IN THE ELEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA

(Filed July 15, 1985)

Case No. 85-07280

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

LUCRECIA HERNANDEZ,
Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.,
ALCAN ALUMINIUM, LTD.,
a Canadian corporation,
and ALCAN ALUMINUM CORPORATION,
a foreign corporation,
Defendants.

COMPLAINT

COMES NOW the Plaintiff, LUCRECIA HERNANDEZ, by and through her undersigned attorneys, and sues the Defendants ALCAN ALUMINIO DO BRASIL, S.A., ALCAN ALUMINIUM, LTD., a Canadian corporation, and ALCAN ALUMINUM CORPORATION, a foreign corporation, and alleges:

1. This is an action for damages in excess of FIVE THOUSAND DOLLARS ($5,000.00) which exceeds the minimal jurisdictional limits of this Court.

2. That at all times material hereto, Defendant ALCAN ALUMINIO DO BRASIL, S.A. was and is a Brazilian corporation, registered in Florida, authorized to do business and/or doing business within the State of Florida.

3. That at all times material hereto, Defendant ALCAN ALUMINIUM, LTD., was and is a Canadian corporation, registered in Florida, authorized to do business and/or doing business within the State of Florida.

4. That at all times material hereto, Defendant ALCAN ALUMINIUM CORPORATION was and is a foreign corporation, registered in Florida, authorized to do business and/or doing business within the State of Florida.

5. That at all times material hereto, the Plaintiff was and is a resident of Miami, Dade County, Florida, and over the age of 18 years.

6. That at all times material hereto, the Defendants, or one of them, was engaged in the business of designing, manufacturing, distributing and/or selling in various parts of the world, including the State of Florida, a pressure cooker commonly called a "Rochedo."

COUNT I
NEGLIGENCE OF DEFENDANTS

The Plaintiff realleges and reavers paragraphs 1 through 6 above and further alleges:

7. That at all times material hereto, Defendants held themselves out to the general public, and this Plaintiff in particular, as well-qualified designers and manufacturers of pressure cookers, possessing skill and knowledge in the design and manufacture of such pressure cookers.

8. That on or about February 22, 1981, while the Plaintiff was using the pressure cooker for its intended use, she was severely injured when the pressure cooker designed, manufactured, sold, distributed and/or otherwise placed in the stream of commerce by the Defendants or one of them, violently separated or otherwise exploded apart.

9. Defendant owed the Plaintiff the duty to exercise reasonable care in the design, manufacture and distribution of said pressure cooker.

10. Defendants or one of them breached said duty by committing one or more of the following negligent acts or omissions:

a. Failing to design, construct, and/or manufacture the pressure cooker with a safety device to prevent injuries such as the type suffered by the Plaintiff.

b. Failing to design, construct and/or manufacture the pressure cooker without its inherent propensity to explode apart causing injury to users or those in close proximity to the product.

c. Continuing to manufacture and sell a product the Defendant knew or should have known had an inherent defect and propensity to explode and failing to recall same.

d. Failing to warn users of the product of its dangerous propensities and/or failing to give adequate instructions on its use.

11. That as a direct and proximate result of the Defendants' negligence, the Plaintiff sustained severe injuries; has suffered loss of wages; has in the past and will in the future suffer physical pain, incurred medical

expenses in the treatment of her injuries; suffered physical handicap and her working ability was impaired; the injuries are permanent within reasonable medical probability and continuing in nature and Plaintiff will suffer the losses and impairments in the future.

WHEREFORE, Plaintiff LUCRECIA HERNANDEZ demands judgment against the Defendants for damages in excess of FIVE THOUSAND DOLLARS ($5,000.00), costs allowed by law and demands a trial by jury of all issues so triable as a matter of right.

COUNT II
STRICT LIABILITY OF DEFENDANTS

The Plaintiff realleges and reavers paragraphs 1 through 6 above and further alleges:

12. That at the time Defendants sold the pressure cooker in question, and/or otherwise placed it in the stream of commerce, it was in a defective condition and was unreasonably dangerous to the Plaintiff.

13. That at all times material hereto, the Defendants were engaged in the business of designing, manufacturing and/or selling pressure cookers in various parts of the world, including the State of Florida and Dade County, including the "Rochedo" pressure cooker previously described herein.

14. At the time Defendants or one of them sold said pressure cooker, the Defendant expected it to, and it did, reach the Plaintiff, as user and/or consumer, without substantial change in the condition in which it was sold.

15. At all times material hereto, Defendants knew that said pressure cooker was in a defective or dangerous condition and likely to cause personal injury, and

proceeded to manufacture, sell and/or distribute said product, and this amounted to willful, wanton, malicious, wreckless, oppressive and outrageous conduct on the part of the Defendants. It is clear that the Defendants hold the rights, safety, life and property of the Plaintiff and the general public in total disregard.

16. As a direct and proximate result of the above-stated defective and unreasonably dangerous condition of said product, Plaintiff suffered the injuries as described in paragraph 11 above.

WHEREFORE, Plaintiff LUCRECIA HERNANDEZ demands judgment against the Defendants for compensatory and punitive damages in excess of FIVE THOUSAND DOLLARS ($5,000.00), costs allowed by law and demands a trial by jury of all issues so triable as a matter of right.

COUNT III
BREACH OF IMPLIED WARRANTY
OF MERCHANTABILITY

The Plaintiff realleges and reavers paragraphs 1 through 6 above and further alleges:

17. That at all times material hereto the Defendants, by selling and/or distributing the product in question, provided Plaintiff with an implied warranty that the product was of merchantable quality.

18. That at all times material hereto the Defendants breached said warranty, in that said product was not of merchantable quality.

19. That as a direct and proximate result of the Defendants' breach of said warranty, the Plaintiff suffered the injuries as described in paragraph 11 above.

WHEREFORE, Plaintiff LUCRECIA HERNANDEZ demands judgment against the Defendants for damages in excess of FIVE THOUSAND DOLLARS ($5,000.00), costs allowed by law and demands a trial by jury of all issues so triable as a matter of right.

COUNT IV
BREACH OF IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE

The Plaintiff realleges and reavers paragraphs 1 through 6 above and further alleges:

20. That at all times material hereto, the Defendants, by designing, manufacturing and/or selling said product in question, provided the Plaintiff with an implied warranty that the product was fit for its intended purpose.

21. That at all times material hereto, Defendants breached said warranty, in that said product was not fit for the particular purpose for which it was sold.

22. That as a direct and proximate result of the Defendants' breach of said warranty, the Plaintiff suffered the injuries as described in paragraph 11 above.

WHEREFORE, Plaintiff LUCRECIA HERNANDEZ demands judgment against the Defendants for damages in excess of FIVE THOUSAND DOLLARS ($5,000.00), costs allowed by law demands a trial by jury of all issues so triable as a matter of right.

COUNT V
BREACH OF EXPRESS WARRANTY

The Plaintiff realleges and reavers paragraphs 1 through 6 above and further alleges:

23. That the Defendants warranted that the product was reasonably fit for its intended use as a pressure cooker.

24. That on or about February 21, 1981, in Miami, Dade County, Florida, said product, being used for its intended purpose, caused injury to the Plaintiff who was then a user of said product.

25. That at all times material hereto, the Defendants breached said warranty, in that said product was not fit for the particular purpose for which it was sold or placed in the stream of commerce.

WHEREFORE, Plaintiff LUCRECIA HERNANDEZ demands judgment against the Defendants for damages in excess of FIVE THOUSAND DOLLARS ($5,000.00), costs allowed by law and demands a trial by jury of all issues so triable as a matter of right.

STABINSKI, FUNT, SULLIVAN
& DE OLIVEIRA
Attorneys for Plaintiff
Third Floor
757 N.W. 27th Avenue
Miami, FL 33125
Tel: (305) 643-3100

/s/ NORMAN FUNT

MOTION TO DISMISS ACTION IN THE UNITED STATES DISTRICT COURT

Civil No. 85-07280

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

LUCRECIA HERNANDEZ,
Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.,
ALCAN ALUMINIUM LIMITED,
a Canadian Corporation;
and ALCAN ALUMINUM CORPORATION,
a foreign corporation,
Defendants.

NOTICE OF MOTION AND MOTION TO DISMISS ACTION; POINTS AND AUTHORITIES IN SUPPORT THEREOF ON BEHALF OF DEFENDANT ALCAN ALUMINIO DO BRASIL

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the defendant Alcan Alumino Do Brasil, S.A. hereby moves this Court pursuant to Rule 12, Federal Rules of Civil Procedure, that Plaintiff's complaint in the above captioned case be dismissed on the following ground:

1. The court lacks in personam jurisdiction.

This motion is based upon the notice of motion filed herein, the points and authorities attached to this motion and the complaint of plaintiff on file herein, together with all other documents in the files of this Court.

DATED: _____ _____, 1985.

Respectfully submitted,

/s/ LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 30th Floor
Cleveland, Ohio 44114
216-523-6962

ROBERT L. LORD, JR., ESQ.
PAPY, POOLE, WEISSENBORN
& PAPY
201 Alhambra Circle, Suite 502
Coral Gables, Florida 33134
305-446-5100

Attorneys for Defendant
Alcan Aluminio do Brazil

MEMORANDUM OF LAW

FACTS

This case arises out of an alleged injury to the plaintiff, Lucrecia Hernandez, by a Rochedo brand pressure cooker manufactured, designed, distributed and/or sold by the defendant Alcan Aluminio Do Brasil, S.A. ("Alcan"), plaintiff's Complaint, ¶6.

Defendant is a Brazilian corporation, defendant's affidavit ¶2. Defendant does not have an office or place of business in Florida, is not registered to do business in Florida and is not authorized to do business and/or is not doing business within the State of Florida, defendant's affidavit ¶7. It neither owns or possesses any real estate in Florida, defendant's affidavit, ¶4. It has no bank accounts, telephone listing, warehouse, or agent in Florida, defendant's affidavit, ¶5.

This court does not have in personam jurisdiction on Defendant because Defendant is not in Florida and because Florida's long-arm statute is prohibited by the Due Process Clause of the United States Constitution from conferring jurisdiction. Therefore, defendant respectfully asks this court to dismiss plaintiff's complaint for lack of jurisdiction.

I.

THIS COURT DOES NOT HAVE IN PERSONAM JURISDICTION OVER ALCAN ALUMINIO DO BRAZIL ("ALCAN").

(a) Alcan Does No Business In Florida.

Plaintiff's first allegation in its complaint alleging a basis for jurisdiction is as follows:

> Defendant ... was and is a Brazilian Corporation, registered in Florida, authorized to do business and/or doing business within the State of Florida (Complaint ¶2).

As the affidavit of Alcan, attached as Exhibit "A", makes clear, this allegation is simply incorrect. Alcan has not and does not conduct business in Florida; it has no establishment in Florida and is not authorized to do business in Florida.

Therefore, this Court may not assert jurisdiction over Alcan on the basis of its presence in Florida.

(b) Florida's Long Arm Statute Is Prohibited By The Due Process Clause From Conferring In Personam Jurisdiction.

This case is controlled by the recent decision of the District Court of Appeal of Florida, Second District in *Maschinenfabrik Seydelmann v. Russell Altman and Robert Reisen & Co., Inc.*, 468 So. 2d 826 (March 15, 1985). In *Seydelmann* the Florida Appellate Court was confronted with the allegation that a foreign manufactured product, meat grinders, caused injuries in Florida. It was through the existence of this product in Florida alone that plaintiff sought to reach the foreign manufacturer. That situation is the same as the allegation in this case that:

> Further plaintiff claims that defendant designed, sold, manufactured, distributed and/or otherwise placed the cooker in question in the stream of commerce.

In *Seydelmann* the only contact with Florida was the twenty-two year history of selling the meat grinders to an American distributor who purchased the grinders in

Germany, imported them into the United States and resold them without the control of the foreign manufacturer.

Alcan stands in the same position as *Seydelmann*. The affidavit of Alcan makes it clear that the cooker in question was purchased in Brazil and brought into Florida without any direction and control from Alcan. As in *Seydelmann* the only nexus between Alcan and Florida is the existence of the Rochedo cooker and that is not enough.

Therefore, this Court does not have in personam jurisdiction over Alcan because the exercise of such jurisdiction would offend the due process clause of the United States Constitution.

CONCLUSION

Since Alcan conducts no business in Florida and because Alcan may not be reached by Florida Long-Arm Statute, this Court should dismiss this case forthwith.

Respectfully submitted,

/s/ LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 30th Floor
Cleveland, Ohio 44114
216-523-6962

ROBERT L. LORD, JR., ESQ.
PAPY, POOLE, WEISSENBORN
& PAPY
201 Alhambra Circle, Suite 502
Coral Gables, Florida 33134
305-446-5100
Attorneys for Defendant
Alcan Alumino Do Brasil, S.A.

EXHIBIT "A"

LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 30th floor
Cleveland, Ohio 44114
216-523-6962

ROBERT L. LORD, JR., Esq.
Papy, Poole, Weissenborn
201 Alhambra Circle, suite 502
Coral Gables, Florida 33134
305-446-5100

ATTORNEYS FOR DEFENDANT
ALCAN ALUMINIUM LIMITED

IN THE UNITED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

LUCRECIA HERNANDEZ,
PLAINTIFF,

VS.

ALCAN ALUMINIO DO BRASIL S.A.,
ALCAN ALUMINIUM LIMITED,
a Canadian corporation,
and ALCAN ALUMINUM CORPORATION,
a foreign corporation,
DEFENDANTS.

CIVIL No. ____

AFFIDAVIT

In support of the motion to dismiss of defendant Alcan Aluminio do Brasil S.A., I, Edward Ian Rugeroni, being duly sworn, depose and state as follows:

1. That I am presently President of Alcan Aluminio do Brasil S.A.

2. That Alcan Aluminio do Brasil S.A. is a corporation organized and operated under the laws of the country of Brazil.

3. That Alcan Aluminio do Brasil S.A. does not have an office or a place of business in Florida.

4. That Alcan Aluminio do Brasil S.A. neither owns nor possesses any real estate or personal property in Florida.

5. That Alcan Aluminio do Brasil S.A. maintains no bank accounts, telephone listings, warehouses, stock of goods or agent in the United States. Further, Group Brazil is not an agent of Alcan Aluminio do Brasil S.A.

6. That Alcan Aluminio do Brasil S.A. has not solicited any business in Florida either personally, through an agent, telephonically or by mail.

7. That Alcan Aluminio do Brasil S.A. has never registered or obtained license to conduct business in Florida.

Further affiant sayeth naught.

/s/ E. I. RUGERONI
Edward Ian Rugeroni
President
São Paulo, 11th September 1985

RENEWED MOTION FOR SUMMARY JUDGMENT IN THE ELEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA

(Dated May 20, 1987)

Case No. 85-07280 CA 23

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Florida Bar No.: 436356

LUCRECIA HERNANDEZ,
Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.,
a Brazilian corporation,
ALCAN ALUMINIUM, LTD.,
a Canadian corporation
and ALCAN ALUMINIUM CORPORATION,
a foreign corporation,
Defendants.

DEFENDANT, ALCAN ALUMINIO DO BRASIL, S.A.'S, RENEWED MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, ALCAN ALUMINIO DO BRASIL, S.A., a Brazilian corporation (ALCAN, S.A.), and filed this its Renewed Motion for Summary Judgment on the matter of in personam jurisdiction and as grounds therefore would show the Court as follows:

1. This case involves an alleged injury by a Rochedo Pressure Cooker. The Plaintiff initially sued Alcan, S.A., Alcan Aluminium Ltd., a Canadian corporation and Alcan Aluminium Corporation, a U.S. corporation.

2. Alcan, S.A. designs, manufactures and sells Rochedo Pressure Cookers in Brazil. These pressure cookers are all sold and delivered FOB Brazil. Alcan, S.A. does not export its pressure cookers into any other country.

3. Some Alcan, S.A. cookers are sold to persons, who buy and take possession of the goods in Brazil, import the goods into the United States and retail the goods directly or wholesale them to retailers.

4. Neither Alcan Aluminium, Ltd., nor Alcan Aluminium Corporation manufacture, design or sell Rochedo Pressure Cookers. Their only connection with this case is that Alcan Aluminium, Ltd. is the parent corporation of Alcan, S.A. and Alcan Aluminium Corporation is an affiliate of Alcan, S.A. After substantial discovery the Plaintiff was unable to establish any connection between Alcan Aluminium, Ltd. and Alcan Aluminium Corporation and the pressure cookers and these parties were dismissed.

5. Alcan, S.A. moved to dismiss on the grounds that the Court lacked in personam jurisdiction, since all its activities were conducted in Brazil and therefore exclusively subject to the laws of Brazil. The Federal Court, relying on a series of cases involving the application of long arm jurisdiction between states, denied Alcan, S.A.'s Motion to Dismiss. Since that decision was rendered in this matter, the United States Supreme Court in its *Asahi Metal Industry Company, Ltd. v. Superior Court of California, In and for the*

County of Solano, ____ U.S. _____, 107 S.Ct. 1026 (1987), _____ L.Ed.2d _____, 55 U.S.L.W. 419, directly addressed the application on specific long arm jurisdiction to aliens[1], and in a unanimous opinion rejected the application of long arm jurisdiction across international boundaries. What is even more significant is that Alcan, S.A. filed a brief amicus curie in that case, attached hereto as Exhibit "1", citing this particular case as an example of the abuse which would result when you exercise in personam jurisdiction as permitted across international bounderies.

ARGUMENT

The U.S. Supreme Court has recognized that it was unfair to subject an alien to the serious burdens of defending itself in a foreign legal system.

In order to exercise in personam jurisdiction for due process purposes, the United States Supreme Court in *Asahi* stated that two tests must be met. First, the defendant must have sufficient "minimum contacts" with the courts seeking to exercise jurisdiction. Second, the exercise of jurisdiction must conform with "traditional notions of fair play and substantial justice". *Asahi*, 55 U.S.L.W. at 4197.

ALCAN, S.A. STANDS IN EXACTLY THE SAME POSITION IN THIS MATTER AS ASAHI DID IN RESPECT TO THE ABSENCE OF MINIMUM CONTACTS

In *Asahi*, 55 U.S.L.W. at 4199, the Supreme Court approved as the governing standard for the minimum contact test the decision of the 8th Circuit Court of

[1] In *Helicoptros Nacionales de Columbia, S.A. v. Hall*, 104 S.Ct. 1868, 466 U.S. 408 (1984), the Supreme Court addressed the issue of general rather than specific jurisdiction and held that the aliens in that case were not subject to the jurisdiction of the Texas courts.

Appeals in *Humble v. Toyota Motor Company, Ltd.*, 727 F.2d 709 (1984), whose material facts correspond exactly to the facts of this case. In *Humble* an injuried car passenger brought suit against Arahawa Auto Body Company, a Japanese corporation that manufactured car seats for Toyota. Arahawa did no business in the United States; it had no office, affiliate, subsidiary, or agent in the United States; it manufactured its component parts outside the United States and delivered them to Tokyo in Japan.

Alcan, S.A. is in exactly the same position as Arahawa. It does no business in the United States; it has no office, affiliate, subsidiary, or agent in the United States; it manufactured its parts outside the United States and delivered them to its customers in Brazil. (See Affidavit of Edward Rugeroni, President of Alcan, S.A., attached hereto as Exhibit "2".)

In fact, given the obvious market of Toyota, Arahawa stood in an even less compelling position than Alcan, S.A. does in this matter. Notwithstanding Arahawa's sales to Toyota and the obvious destination of its product, the 8th Circuit stated:

> [a]lthough it does not doubt that Arahawa could have forseen that its parts were on its way to the United States", "it would be manifestly unjust to require Arahawa to defend itself in the United Statse." See *Humble,* F2d at 710-711, quoted in *Asahi,* 55 U.S.L.W. at 4199.

This same position had been adopted recently by the Florida courts. In *Maschinenfabrick Seydelmann v. Altman,* 468 So2d 826 (1985), the evidence demonstrated that Seydelmann, a German manufacturer of meat grinders, that had historically sold meat grinders for

twenty-two (22) years to a Florida wholesaler who resold them without any control by Seydelmann. The German manufacturer designed, manufactured, sold and delivered the grinders in Germany. In refusing to find the needed contacts, the Florida court, by the same logic as the courts in *Asahi* and *Humble* stated:

> Seydelmann carries no discernible activities in Florida. The only nexus between Seydelmann and Florida is the presence in Florida of meat grinders manufactured by Seydelmann in Germany. The minimum contact test is not met merely by showing that a manufacturer could forsee that his product would be used in a particular state and that he derived some indirect economic benefit from its use. Before a long arm statute may constitutionally be used to obtain jurisdiction over a non-resident defendant, some evidence must be presented to show that the defendant "purposely [availed] itself of the privilege of conducting activities within the forum state." *Hanson v. Deckla*, 357 U.S. at 253, at 468 So2d 290.

No such evidence exists in this case.

In the initial decision of this case, Judge Scott relied on *Burger King v. Rudzewitz*, 471 U.S. 462 (1985)[2] in particular, as though that case was applicable. However, as *Asahi*, *Humble*, and *Seydelmann*, illustrate, Judge Scott's analysis was incorrect. Judge Scott's analysis would have subjected each of the alien Defendants to in personam jurisdiction under the logic that they are selling to a person in their own country that they knew were reselling the product in the United States was

[2] *Burger King* involved a franchise agreement where Rudzewicz (a Michigan resident) signed an agreement consenting to be governed by the laws of the State of Florida where Burger King resided.

sufficient minimum contacts. Judge Scott concluded, "here the Defendant purposely established contact with a foreign state by selling its products to sales companies knowing that these products would be sold to Florida." Opinion, Page 1. (Opinion of Judge Scott attached hereto and made a part hereof as Exhibit "3"). However, it is clear in *Asahi* that merely selling a product to someone in your country who you know will resell in the United States is not enough to meet the required minimum contacts test.

The second part of the minimum contacts test when it was reaffirmed by the Supreme Court in *Asahi* is a requirement that the act giving rise to the minimum contacts must be such that the Defendant "invokes the benefits and protections of its laws", *Asahi,* 55 U.S.L.W. at 4198. Alcan, S.A. in its amicus brief urged the Court to reaffirm this principle, stating that it gave aliens a "fair and objection" standard upon which to assert jurisdiction if the aliens manufacturing and sales activities benefited from Florida law it was fair to impose liability.

One need simply ask what benefits of the Florida law has Alcan, S.A. invoked? The answer is quite obvious none. Any privileges it has are strictly under Brazilian law. Without the benefits of Florida law, the imposition of liability would be patently unfair.

THE APPLICATION OF IN PERSONAM JURISDICTION MUST COMFORM WITH TRADITIONAL NOTIONS OF FAIRNESS

Beyond the question of contacts, the Plaintiff must show that traditional notions of fair play and substantial justice permit the exercise of jurisdiction. *Asahi,* 55 U.S.L.W. at 4200. Judge Scott never even considered

this requirement. The Supreme Court cites three areas to be evaluated in making a determination of fairness; (1) the burden on the defendant; (2) the interests of the forum state; and (3) the plaintiff's interest in obtaining the relief.

First, consider the interest of the plaintiff in obtaining the relief. In personam jurisdiction, would not have left the plaintiff without a remedy. In fact, the plaintiff in this case would have a remedy against both the importer/distributor, who is a Florida resident, and the Florida retailer. The plaintiff voluntarily chose not to sue either of these parties so its present lack of a remedy is one of its own making.

The second area is the interest of the forum state. The interest of Florida is even more attenuated. The first arguable interest is that Florida might have an interest in seeing that its wholesaler was indemnified. However, any indemnity would be in contractual arrangements of sale, all clearly governed by Brazilian law—an issue best left to the Brazilians. This is especially true since Alcan, S.A.'s non-existence in the United States and Florida would make Florida completely dependent on the Brazilian courts for their review, concurrent in enforcement of a Florida judgment.[3] Further, the Florida wholesaler is not even a party to this case.

The second argument for Florida's interest is the insurance of safe products in Florida, and that interest was specifically rejected by the Supreme Court in *Asahi*

---

[3] Moreover, it should not be assumed that even if jurisdiction were proper that Florida law could govern this case. It is Alcan, S.A.'s position that the foreign commerce laws of the United States Constitution would require Brazilian law to apply. See Exhibit "4", Reply Brief of Alcan Aluminum do Brazil, S.A., pages 13 and 14.

which noted that the market forces would insure safe products as long as the seller of the products was subject to the forum's law;

> The Supreme Court of California argued that the state had an interest in "protecting its consumers by insuring that foreign manufacturers comply with the State's safety standards . . . The possibility of being haled into a California court as a result of an accident involving Asahi's components, and that only creates an additional deterent to the manufacturer of unsafe components; However, similar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law. *Asahi,* 55 U.S.L.W. at 4200.

Thus, we can see that the Plaintiff has a remedy for her alleged injury and Florida has little or no interest in exercising jurisdiction which, even if it were exercised, is necessarily dependent upon the Brazilian courts for enforcement.

Finally, one must evaluate the interest of the plaintiff in this case. Clearly the objective in this case is to take advantage of the serious burdens on alien defendants. The Supreme Court noted in *Asahi* that courts should not require an alien that otherwise does not function in the United States to defend a case here. The Court stated that courts should have "an unwillingness to find the serious burdens on alien outweighed by the minimal interest on the part of the plaintiff or the forum state". *Asahi,* 55 U.S.L.W. at 4200. In this case, the plaintiff's only interest is to use the serious burdens to force a settlement irrespective of the merits of the lawsuit.

Although initially claiming $150,000 in damages, the plaintiff has defeated diversity jurisdiction by now limiting her remedy to less than $10,000 knowing that it has to be far much less expensive for an alien to pay the $10,000 rather than defend a meritless claim halfway around the world. It is this type of abuse the Supreme Court recognized in *Asahi* and required the courts to prevent because it knew that permitting such conduct would ultimately have a negative impact on foreign relations. Therefore, since jurisdiction was rejected on equivalent facts in *Asahi* it must be rejected by this Court.

CONCLUSION

This case involves the application of in personam jurisdiction across international bounderies. Before *Asahi* a federal trial judge rejected the notion that the standards of fairness in evaluating the exercise of jurisdiction over an alien should not be any different than over United States citizens. It is clear Judge Scott would have exercised jurisdiction over Asahi without giving the matter a second thought.

The Supreme Court of the United States has now recognized the serious burdens on aliens required to defend a case in the United States. It has rejected the idea they are to be treated just like United States citizens. Moreover, it has recognized the serious foreign relations implications involved in the transnational exercise of jurisdiction and clearly stated that "Great care and reserve should be exercised when extending our nation's in personam jurisdiction into the international field." *Ashai,* 55 U.S.L.W. at 4200, quoting *United States v. First National City Bank,* 397 U.S. 378, 404 (1965) (Harlan, J. dissenting). Here, the Plaintiff, who sat

on her right against available Florida residents, invites this Court to join her in venturing into the international arena in which it does not belong, against the express prohibition of the United States Supreme Court, and for the most abusive of reasons. This Court must reject the invitation forthwith and dismiss this case for lack of in personam jurisdiction.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Defendant, Alcan Aluminum do Brazil, S.A.'s Renewed Motion for Summary Judgment was furnished to Marc L. Goldman, Esquire, Stabinski & Funt, 757 Northwest 27th Avenue, Third Floor, Miami, Florida 33125-3093 this 20 day of May, 1987.

LAWRENCE A. SALIBRA, ESQUIRE
Counsel for Alcan, S.A.
100 Erie Plaza, 29th Floor
Cleveland, Ohio 44114

PAPY, POOLE, WEISSENBORN
& PAPY
Co-Counsel for Alcan, S.A.
201 Alhambra Circle—Suite 502
Coral Gables, Florida 33134
Telephone: (305) 446-5100

By: STEPHEN A. PAPY
Stephen A. Papy

APPELLANT'S INITIAL BRIEF FILED IN THE DISTRICT COURT OF APPEAL OF FLORIDA

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Appellant,

v.

LUCRECIA HERNANDEZ,
Appellee.

APPELLANT'S INITIAL BRIEF

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle Suite 502
Mailing Address:
P.O. Box 141939
Coral Gables, Fla. 33114-1939
Phone: (305) 446-5100

INTRODUCTION

The Appellant, Alcan Alumino Do Brasil, S.A. was one of the defendants below. In this brief we will refer to the Appellant as "Alcan." The Appellee, Lucrecia Hernandez, was the Plaintiff below. In this Brief we will refer to her as "Hernandez."

The symbol "A" will stand for the Appendix herein. All emphasis is ours unless the contrary is indicated.

STATEMENT OF CASE AND FACTS

In July 1985, Hernandez filed a complaint for damages arising out of an injury that she had received in February 1981, as a result of a malfunction of a Rochedo Pressure Cooker (A 1-7). She filed her suit in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida and named as the defendants, Alcan, a Brazilian corporation; Alcan Aluminium Ltd., a Canadian corporation; and Alcan Aluminum Corporation, a New York corporation (A 1-7).

Thereafter, Alcan and the other defendants filed a Petition for Removal to the United States District Court for the Southern District of Florida on the basis of diversity of citizenship (A 8-10). This Motion was granted, and the case was taken through much of the discovery stages in the United States District Court. It became apparent, however, that the case would not in good faith meet the $10,000.00 test of damages. Hence, on October 3, 1986, the matter was remanded to the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida (A 11).

Alcan does manufacture a Rochedo pressure cooker (A 56-57). However, Alcan is a Brazilian corporation, with no offices in Florida. It is not registered to do business, in Florida, nor is it doing business in Florida (A 28). In fact, Alcan (1) has no office or place of business in Florida; (2) has no property in Florida, either real or personal in Florida; (3) has no agents in Florida; and (4) has not solicited any business in Florida (A 28). Yet, the Court has held that it has personal jurisdiction over its person.

Through various discovery matters the parties continued to prepare their case for trial and on May 27, 1987, Alcan filed a Motion for Summary Judgment on the issue of the Court's jurisdiction over its person (A 12-54).

The trial court denied this motion and determined that it had jurisdiction over the person of Alcan, a Brazilian corporation (A 55).

This Appeal follows.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED WHEN IT MADE A DETERMINATION THAT IT HAD IN PERSONAM JURISDICTION OVER ALCAN, A BRAZILIAN CORPORATION, THAT HAD NOT CONDUCTED ACTIVITIES OUTSIDE OF BRAZIL?

SUMMARY OF ARGUMENT

In order for a court to obtain personal jurisdiction, it is necessary that there be certain minimum contacts with the state and further that the exercise of the jurisdiction must be such that it would conform with the "traditional notions of fair play and substantial justice."

In the instant case none of the requisite minimum contacts are found. Alcan does absolutely no business in Florida, it maintains no ownership over any type of property located in Florida, nor does it have any control over its products once they are sold in Brazil. In short, Alcan is not subject to the jurisdiction of a Florida State Court because there are no minimum contacts to this jurisdiction.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT MADE A DETERMINATION THAT IT HAD IN PERSONAM JURISDICTION OVER ALCAN, A BRAZILIAN CORPORATION, THAT HAD NOT CONDUCTED ACTIVITIES OUTSIDE OF BRAZIL?

It has been established by the United States Supreme Court that it is unfair to subject an alien to the serious burdens of defending itself in a foreign legal system. *Asahi Metal Industry Company, Ltd. v. Superior Court of California, In and for the County of Solano,* 480 U.S. _____, 108 S.Ct. _____, 94 L.Ed.2d 92, (1987).

In order to exercise in personam jurisdiction for due process purposes, the United States Supreme Court, in the case of *Asahi,* supra., stated that two tests must be met. First, the defendant must have sufficient "minimum contacts" with the courts seeking to exercise jurisdiction. Second, the exercise of jurisdiction must conform with "traditional notions of fair play and substantial justice". *Asahi,* supra. at _____.

In *Asahi,* supra. the Supreme Court approved as the governing standard for the minimum contact test the decision of the 8th Circuit Court of Appeals in *Humble v. Toyota Motor Company, Ltd.,* 727 F.2d 709 (1984), whose material facts correspond exactly to the facts of this case. In *Humble,* supra., an injured car passenger brought suit against Arahawa Auto Body Company, a Japanese corporation that manufactured car seats for Toyota. Arahawa did no business in the United States; it had no office, affiliate, subsidiary, or agent in the United States; and it manufactured its component parts outside the United States and delivered them to Tokyo, Japan.

Arahawa filed a motion to dismiss for lack of in personam jurisdiction. The district court granted that motion stating that:

> [t]he court does not doubt that Arakawa could have forseen that its product would find its way into the United States and Iowa, however, it is doubtful that Arakawa could reasonably have anticipated being haled into court in Iowa. Arakawa has not advertised, solicited any business, or otherwise sought to serve any market in the United States, Arakawa has merely sold its products to TMC in Japan, pursuant to the specifications and design of TMC. . . . It would be manifestly unjust to require Arrakawa to defend itself in a foreign country when the allegedly defective product has not been designed, marketed, or placed in a stream of American commerce by Arakawa.

Humble, supra. at 709, cited in part in *Asahi,* supra at 104.

Alcan, S.A. is in exactly the same position as Arahawa. It does no business in the United States; it has no office, affiliate, subsidiary, or agent in the United States; and it manufactured its parts outside the United States and delivered them to its customers in Brazil (A 28).

In fact, given the obvious market of Toyota, Arahawa stood in an even less compelling position than Alcan, S.A. does in this matter. Notwithstanding Arahawa's sales to Toyota and the obvious destination of its product, the 8th Circuit held that the court had not achieved the minimum contacts that were necessary to achieve jurisdiction in the Iowa state court.

This same position was adopted recently by the Florida courts. *Maschinenfabrick Seydelmann v. Altman*, 468 So2d 286 (1985). In *Maschinenfabrick*, supra., a case similar to the instant case, the Plaintiff, as in the instant case, was injured by a product manufactured by Seydelman, a German manufacturer of meat grinders, that had historically sold meat grinders for twenty-two (22) years to a U.S. distributor for resale purposes. Some of those meat grinders were resold to Florida. All of the sales had been made FOB in the German seaport of Bremen, and the manufacturer had no control over the products sold to the distributor after the sale had been made to him by Seydelmann. Seydelman designed, manufactured, sold and delivered the grinders in Germany. In refusing to find the needed contacts, the Second District, by the same logic as the courts in *Asahi* and *Humble*, stated:

> Seydelmann carries no discernible activities in Florida. The only nexus between Seydelmann and Florida is the presence in Florida of meat grinders manufactured by Seydelmann in Germany.
>
> The minimum contact test is not met merely by showing that a manufacturer could forsee that his product would be used in particular state and that he derived some indirect economic benefit from its use. Before a long arm statute may constitutionally be used to obtain jurisdiction over a nonresident defendant, some evidence must be presented to show that the defendant "purposely [availed] itself of the privilege of conducting activities within the forum state." *Hanson v. Deckla*, 357 U.S. at 253, . . . No such evidence exists in this case.

Maschinenfabrik, supra. at 290.

It is quite clear, therefore, that merely selling a product to someone in your country who you know will resell in the United States is not enough to meet the required minimum contacts test. *Asahi,* supra.; *Humble,* supra.; *Maschinenfabrik,* supra.

The second part of the minimum contacts test when it was reaffirmed by the Supreme Court in *Asahi,* supra. is a requirement that the act giving rise to the minimum contacts must be such that the Defendant "invokes the benefits and protections of its laws". Alcan would respectfully submit that it has not not sought the protection of Florida law nor has it sought a benefit under Florida law.

One need simply ask what benefits of the Florida law has Alcan has invoked. The answer is quite obviously "none." Any privileges it has are strictly under Brazilian law. Without the benefits of Florida law, the imposition of liability would be patently unfair.

Beyond the question of minimum contacts, the Plaintiff must show that traditional notions of fair play and substantial justice permit the exercise of jurisdiction. *Asahi,* supra. This requirement was not considered in the instant case.

In *Asahi,* supra., the Supreme Court cites three areas to be evaluated in making a determination of fairness: (1) the burden on the defendant; (2) the interests of the forum state; and (3) the plaintiff's interest in obtaining the relief.

First, in the instant case, consider the interest of the plaintiff in obtaining the relief. In personam jurisdiction would not have left the plaintiff without a remedy. In fact, the plaintiff in this case would have a remedy against both the importer/distributor, who is a Florida

resident, and the Florida retailer. The plaintiff voluntarily chose not to sue either of these parties, so its present lack of a remedy is one of its own making.

The second area is the interest of the forum state. The interest of Florida is even more attenuated. The first arguable interest is that Florida might have an interest in seeing that its wholesaler was indemnified. However, any indemnity would be in contractual arrangements of sale, all clearly governed by Brazilian law—an issue best left to the Brazilians. This is especially true since Alcan's non-existence in the United States and Florida would make Florida completely dependent on the Brazilian courts for their review, concurrent in enforcement of a Florida judgment.[1] Further, the Florida wholesaler is not even a party to this case.

The second argument for Florida's interest is the insurance of safe products in Florida, and that interest was specifically rejected by the Supreme Court in *Asahi* which noted that the market forces would insure safe products as long as the seller of the products was subject to the forum's law;

> The Supreme Court of California argued that the state had an interest in "protecting its consumers by insuring that foreign manufacturers comply with the State's safety standards." . . . The possibility of being haled into a California court as a result of an accident involving Asahi's components, and that only creates an additional deterent to the manufacturer of unsafe components; However,

---

[1] Moreover, it should not be assumed that even if jurisdiction were proper that Florida law could govern this case. It is Alcan's position that the foreign commerce laws of the United States Constitution would require Brazilian law to apply. See (A 47-48).

> similar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.

Asahi at 106.

Thus, we can see that the Plaintiff has a remedy for her alleged injury and Florida has little or no interest in exercising jurisdiction which, even if it were exercised, is necessarily dependent upon the Brazilian courts for enforcement.

Finally, one must evaluate the interest of the plaintiff in this case. Clearly the objective in this case is to take advantage of the serious burdens on alien defendants. The Supreme Court noted in *Asahi,* supra. that courts should not require an alien that otherwise does not function in the United States to defend a case here. The Court stated that courts should have "an unwillingness to find the serious burdens on aliens outweighed by the minimal interest on the part of the plaintiff or the forum state". *Asahi,* supra. In this case, the plaintiff's only interest is to use the serious burdens to force a settlement irrespective of the merits of the lawsuit.

Although initially claiming $150,000 in damages, the plaintiff has defeated diversity jurisdiction by now limiting her remedy to less than $10,000 knowing that it has to be far less expensive for an alien to pay the $10,000 rather than defend a meritless claim halfway around the world. It is this type of abuse the Supreme Court recognized in *Asahi,* and required the courts to prevent because it knew that permitting such conduct would ultimately have a negative impact on foreign relations. Therefore, since jurisdiction was rejected on

equivalent facts in *Asahi,* supra.; and in *Maschinenfabrik,* supra., it is respectfully submitted that it should have been rejected by the Trial Court.

CONCLUSION

This case involves the application of in personam jurisdiction across international bounderies which the Supreme Court of the United States has now recognized can place serious burdens on aliens required to defend a case in the United States. It has rejected the idea they are to be treated just like United States citizens. Moreover, it has recognized the serious foreign relations implications involved in the transnational exercise of jurisdiction and clearly stated that "Great care and reserve should be exercised when extending our nation's in personam jurisdiction into the international field." *Asahi,* at 106, quoting *United States v. First National City Bank,* 397 U.S. 378, 404 (1965) (Harlan, J. dissenting). Here, the Plaintiff, who sat on her right against available Florida residents, invites this Court to join her in venturing into the international arena in which it does not belong, against the express prohibition of the United States Supreme Court and for the most abusive of reasons. This Court should therefore reject the invitation forthwith and dismiss this case for lack of in personam jurisdiction.

Respectfully submitted,

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle
Coral Gables, Fla.
Phone: (305) 446-5100

By: /s/ SHERIDAN WEISSENBORN

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Appellant was mailed to Marc L. Goldman, Esquire, Stabinski & Funt, 757 Northwest 27th Avenue, Third Floor, Miami, Florida 33125-3093 this 12th day of November, 1987.

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle, Ste. 502
Mailing Address:
P.O. Box 141939
Coral Gables, FL 33114-1939
(305) 446-5100

By: /s/ SHERIDAN K. WEISSENBORN

PETITION OF LAWRENCE A. SALIBRA, II FOR LEAVE TO APPEAR PRO HAC VICE

Case No.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

LUCRECIA HERNANDEZ,
Plaintiff/Appellee,

vs.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants/Appellant.

PETITION OF LAWRENCE SALIBRA FOR LEAVE TO APPEAR AND PARTICIPATE PRO HAC VICE

COMES NOW the Petitioner, LAWRENCE A. SALIBRA, II, and petitions this Honorable Court for admission to this Court pro hac vice for the limited purpose of representing the Appellant in this action, pursuant to the Florida Rules of Appellate Procedure, Rule 9.440.

At the present time, I am a member in good standing of the bar associations in the following states: Wisconsin, Illinois and New York. I am also a member in good standing of the following District Courts: Western District of Wisconsin, Northern District of Illinois and the Northern District of Ohio. Additionally, I am a member of the Second, Sixth, Seventh and Ninth Circuit Courts of Appeals.

I have obtained the consent of Sheridan K. Weissenborn, a member of this Court's bar, who maintains an office in this district for the practice of law, with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers may be served. Mr. Papy's statement of consent is attached hereto.

I have discussed my petition with counsel for the Plaintiff and can state to the Court that he has no objection to this petition.

/s/ LAWRENCE A. SALIBRA, II

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MARC L. GOLDMAN, ESQ., Stabinski & Funt, Third Floor, 757 NW 27th Avenue, Miami, FL 33125; this 2nd day of December, 1987.

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle, Suite 502
Mailing Address:
P. O. Box 141939
Coral Gables, FL 33114-1939
(305) 446-5100

By: SHERIDAN K. WEISSENBORN

BRIEF OF AMICUS CURIAE ALCAN ALUMINIO DO BRASIL, S.A. IN SUPPORT OF PETITIONER FILED IN THE UNITED STATES SUPREME COURT IN ASAHI METAL INDUSTRY CO., LTD. V. SUPERIOR COURT OF CALIFORNIA

No. 85-693

In the Supreme Court of the United States

October Term, 1985

ASHAHI METAL INDUSTRY CO., LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF SOLANO (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST),
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF AMICUS CURIAE ALCAN ALUMINIO DO BRASIL, S.A. IN SUPPORT OF PETITIONER

LAWRENCE A. SALIBRA, II, *Counsel of Record*
100 Erieview Plaza
Cleveland, Ohio 44114
(216) 523-6918
Attorney for Amicus Curiae
Alcan Aluminio do Brasil, S.A.

A51

No. 85-693

In the Supreme Court of the United States

October Term, 1985

ASHAHI METAL INDUSTRY CO., LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF SOLANO (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST),
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF AMICUS CURIAE ALCAN ALUMINIO DO BRASIL, S.A. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Alcan Aluminio do Brasil, S.A. ("Alcan") is a Brazilian corporation with headquarters in Sao Paulo, Brazil. Alcan is a wholly integrated aluminum manufacturer. All of its operations take place in Brazil.

Alcan is presently being sued by various plaintiffs in the United States and Puerto Rico, notwithstanding the fact that Alcan has no presence in the United States or Puerto Rico; and the cookers which were alleged to have caused the injuries involved in these cases were designed, manufactured and sold in Brazil.

Suing Alcan in the United States places an unfair burden on Alcan by forcing it to defend itself halfway around the world and subjects it to a series of laws and regulations of a jurisdiction whose laws and regulations provide no protection or benefit to it in connection with its activities.

Written consent to file this brief has been obtained from counsel for Petitioner and Respondent. Copies are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case presents an issue of growing concern to corporations whose products find their way into the expanding international marketplace. That issue is whether the presence of a company's goods in the United States subjects it to the courts and laws of the United States even though it has no presence in the United States and designs, manufactures and sells its products outside of the United States.

It is the position of Alcan that the assertion of jurisdiction over foreign national corporations simply because of the existence of their product in the United States, as exemplified by this case, is improper. These decisions conflict with the guidelines articulated by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and they fail to acknowledge the substantially greater burden in establishing a basis in fairness when jurisdiction is asserted across *national* as opposed to state boundaries.

Alcan believes that the proper standard to be adopted by this Court is that promulgated in the case of *Hanson v. Denckla*, 357 U.S. 235 (1958), that a defendant must be connected to a forum to such a degree that he benefits from the laws of a forum before he can be sued in that forum. Because of the potential for abuse and inherent unfairness in requiring a foreign national to defend a case in a different country with different laws, customs and often language, this Court should require that a foreign national be receiving the benefits and protection of those laws prior to being subjected to liability under those laws. Any other standard would be an impractical standard and inherently unfair. Adopting such a standard would not disadvantage American

consumers whose state and local legislative authorities have adequate measures available to them to protect the public.

Finally, permitting the exercise of jurisdiction in such cases does not resolve all the constitutional controversies inherent in these cases, since an attempt by California to adjudicate liability under California law would simply raise the foreign commerce issue as to whether a state law burdens foreign commerce when it applies to activities which all take place outside of the United States.

For the foregoing reasons, Alcan believes the decision of the Supreme Court of California should be reversed.

ARGUMENT

I. DUE PROCESS REQUIRES THE PRESENCE OF A PRODUCT AND PURPOSEFUL EFFORT TO AVAIL ONESELF OF THE PRIVILEGE OF CONDUCTING BUSINESS IN THE FORUM SEEKING TO ASSERT JURISDICTION.

a. Due Process Requires More Than The Foreseeable Presence Of A Product In The Jurisdiction.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court clearly stated that more than mere foreseeability that a product will enter a jurisdiction is necessary in order for a court in that jurisdiction to assert in personam jurisdiction. In this regard this Court said:

> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state, but rather is that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being hauled into court. Nor can jurisdiction be supported on the theory that petitioners earn substantial revenue from goods used in Oklahoma.

Id. at 297.

In making this evaluation—that a defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court—it seems rather trite to point out that there is a great difference between whether or not a U.S. national might be sued in another state as contrasted with the expectation by a foreign national that it might be sued in another country for a product he sold in his country. In

fact, the differences are as significant as the difference between movement across state borders as contrasted with movement across national borders.

The vast majority of cases on in personam jurisdiction, and all of the prior in personam jurisdiction[1] cases before this Court, have involved the assertion of jurisdiction between U.S. nationals and among states. Some courts have applied these principles, as has the California Supreme Court in this case, to foreign nationals operating exclusively in their own countries without any effort to recognize the significant difference between U.S. states and other nations. See, e.g., *Nelson v. Park Industries,* 717 F.2d 1120 (7th Cir. 1983); *Oswalt v. Scripto, Inc.,* 616 F.2d 191 (5th Cir. 1980); and *Hedrick v. Daiko Shoji Co.,* 715 F.2d 1355 (9th Cir. 1983) *reh. granted, op. withdrawn, in part,* 733 F.2d 1335 (9th Cir. 1984).

However, not all courts have been insensitive to the common underlying national character that permits the assertion of in personam jurisdiction between states. In *Ford Motor Company v. Atwood Vacuum Machine,* 392 So.2d 1305 (Fla. 1981) *cert. denied* 452 U.S. 901, the Florida Supreme Court allowed the assertion of jurisdiction on a citizen of another state recognizing that it was applying American municipal law, not a form of international law:

> The peculiar features of the jurisdictional problem in the United States, then, is that our national economic and social unity is conducive to the full panoply of

* * * * *

[1] Clearly, this excepts *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408 (1984) where the issue was general rather than specific jurisdiction, since specific jurisdiction is the issue involved in the present case.

* * *

II. FAILURE TO PERMIT THE EXERCISE OF IN PERSONAM JURISDICTION UPON A FOREIGN NATIONAL CONDUCTING BUSINESS ABROAD DOES NOT LEAVE THE CONSUMER WITHOUT A REMEDY.

As this case graphically illustrates, an injured consumer has more than an adequate remedy for an injury resulting from a defectively designed and/or manufactured product. In this case the injured plaintiff did not even sue the defendant. Injured plaintiffs have, at a minimum, importers and retailers in the United States who would be subject to suit. If states, or the United States, believe greater protection is necessary, they can legislate greater insurance protection by requiring importers and/or retailers of foreign manufactured products to have a minimum level of insurance in the United States to cover the cost of the products they sell.

III. PERMITTING THE EXERCISE OF IN PERSONAM JURISDICTION IN CASES SUCH AS THE CASE AT BAR CREATES THE POTENTIAL FOR ABUSE.

In a case presently pending in the Federal District Court in Miami involving this amicus, *Lucrecia Hernandez v. Alcan Aluminio do Brasil, S.A., et al.*, U.S. District Court, Southern District of Florida, Case No. 85-2729-CIV-SCOTT, the plaintiff who alleges injury by a pressure cooker sued Alcan, its U.S. affiliate who neither makes nor sells pressure cookers and its Canadian parent who neither makes nor sells pressure cookers. The plaintiff has never made an effort to sue the Miami retailer or importer even though she was fully

capable of doing so and, in fact, has allowed the statute of limitations to run against these parties forever barring her claims against them. Why would a plaintiff clearly ignore immediately available and directly related parties and instead sue a series of Alcan companies whose common characteristic is that they are foreign to the Florida jurisdiction (the U.S. company, Alcan Aluminum Corporation, is an Ohio corporation with head offices outside of Florida); two of the companies do not even exist in the United States, and only one, Alcan Aluminio do Brasil, S.A., has any conceivable relevance to the claim. The answer is simple; the plaintiff wants to economically force a settlement regardless of the merits of her claim.

It is well recognized that defending a lawsuit outside of the jurisdiction in which you reside is more costly than defending a lawsuit in your place of residence. Thus, being forced to defend a case in another state puts you at some economic disadvantage. However, having to defend a case in a completely different country, many thousands of miles away, with the difficulties of language and culture, can create enormous disadvantages of cost for foreign national defendants. These economic disadvantages can obviate the fundamental fairness upon which the U.S. justice system rests.

IV. THE EXERCISE OF JURISDICTION BY U.S. COURTS IMPLIES THAT FOREIGN COURTS MAY EXERCISE JURISDICTION ON U.S. NATIONALS UNDER SIMILAR CIRCUMSTANCES.

The recent expansive exercise of jurisdiction as exemplified by the facts of this case have thus far been limited to courts in this country. However, if it is fair for a U.S. court to exercise jurisdiction over a foreign national simply because some of its products foreseeably make their way into the United States through the effort

* * * * *

Plaintiff in this case would have the California Court impose California law on the activities of petitioner conducted wholly outside the United States. While in *Japan Line,* Japan Line owned the container in the United States, petitioner was not the owner of the chattel which allegedly injured the plaintiff. Its activities were entirely in foreign commerce and the imposition of California law on those activities necessarily results in a violation of the Foreign Commerce Clause.

Thus, if this Court were to find in personam jurisdiction, it would then have to apply Taiwanese and/or Japanese law to determine the existence and extent of liability, and that task might better be left to those courts.

CONCLUSION

This Court should clearly reject the notion that United States courts can, consistent with the Due Process Clause, exercise in personam jurisdiction over foreign nationals who design, manufacture and sell a product outside of the United States, simply because it is

reasonably foreseeable that the product will make its way into the United States through the efforts of third parties.

Such a doctrine in today's international marketplace would, as a practical matter, confer world-wide jurisdiction in the United States.

U.S. citizens are adequately protected by limiting jurisdiction to those entities who introduce the product into the United States or its retailer and laws requiring liability insurance offer the opportunity for additional protection if the legislative aim of the government deems it necessary. Denying in personam jurisdiction would also eliminate the potential for substantial abuse and unfairness of haling foreign nationals into a U.S. forum, putting them at a severe economic and cultural disadvantage, and then attempting to judge propriety of their activities not by the laws of the country in which those activities took place, but rather by the laws of a state in which one of their products comes to reside.

The present doctrine developed by this Court promulgated in *Volkswagen* and *Hanson*, if adapted to the foreign context, provides a sound theoretical basis to reject the application of in personam jurisdiction in this case, and Amicus urges this Court to so hold.

Respectfully submitted,

LAWRENCE A. SALIBRA, II *Counsel of Record*
100 Erieview Plaza
Cleveland, Ohio 44114
(216) 523-6918
Attorneys for Amicus Curiae
Alcan Alumnio do Brasil, S.A.

MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION TO APPEAR PRO HAC VICE

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

LUCRECIA HERNANDEZ,
Plaintiff/Appellee,

v.

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendants/Appellant.

MOTION FOR RECONSIDERATION OF ORDER DENYING THE MOTION OF LAWRENCE SALIBRA FOR ADMITTANCE PRO HACE VICE

The Appellant, ALCAN ALUMINIO DE BRASIL, S.A., by and through undersigned counsel files this its Motion for Reconsideration of the recent order of this Court denying the admittance of its general counsel Lawrence Salibra and as grounds therefore would show the Court as follows:

1. That this Court has been misled by the rambling conclusions that have been stated by opposing counsel in his objection to the admission of Mr. Salibra, pro hace vice and has further been misled into a belief that Mr. Salibra was never authorized, by Judge Scott, to practice before him in connection with the instant case. In short

Mr. Salibra was admitted to practice by Judge Scott on the 2nd day of October, 1986. (a copy of the order is attached hereto as exhibit A).

2. This Court has overlooked the fact that due process of law as provided for in the State and Federal Constitution provides that as a general rule it is a denial of one's constitutional right to due process to deny him or her the right to counsel of his choice. See 16 Am Jur.2d, *Constitutional Law,* §842 (1979). Further this Court has failed to consider that although it is within the sound discretion of this Court to allow the appearance of Mr. Salibra it would appear that there is no evidentiary matter before the Court that should prevent him from being able to perform in a proper manner with the quality that should be required of a member of this bar nor is there evidence that he is of poor moral character or has poor judgment. Article 2 of the Integration Rule, Subsection 2 provides that an attorney of another state, who is in good standing, who has professional business in a court of record in this state may, upon motion, be permitted to practice for the purpose of such business upon such conditions as the court deems appropriate under the circumstances. Mr. Salibra is in good standing in other states and in the federal courts and therefore to deny him admission in the instant case when there is no good and cogent reason to have excluded him is simply a denial of due process.

3. The Court has failed to consider that what the Appellee is doing is attempting to use this court to assist it in forcing this Appellant to settle this cause due to the added expense of having to pay additional counsel in order to pursue this appeal. That this is so is made evident by the argument that is put forth by the Appellee in its objection. There is simply no evidence to

support the allegations of the Appellees counsel as stated in his objections, rather there are only allegations and conclusions. Without some evidence it appears to be an abuse of discretion to disallow the pro hace vice motion of the Appellant.

4. If the Court were to allow Mr. Salibra to appear he is subject to the rules and procedures of this Court and would be subject to discipline by virtue of his special appearance. Therefore, there is ample protection of the Court from any improper acts. See *Parker v. Parker,* 97 So.2d 136 (Fla. 3rd D.C.A. 1957).

WHEREFORE, the Appellant moves this Honorable Court to reconsider its request that its counsel of choice, Mr. Lawrence Salibra, be allowed to appear in this cause, as counsel on its behalf for the purpose of oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion for Reconsideration was mailed to Marc L. Goldman, Esquire, Stabinski & Funt, 757 Northwest 27th Avenue, Third Floor, Miami, Florida 33125-3093 this 4th day of January, 1988.

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle, Ste. 502
Mailing Address:
P.O. Box 141939
Coral Gables, FL 33114-1939
(305) 446-5100
By: SHERIDAN K. WEISSENBORN

NOTICE OF WAIVER OF ORAL ARGUMENT

Case No. 87-1697

IN THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

LUCRECIA HERNANDEZ,
Plaintiff/Appellee,

vs.

ALCAN ALUMINIO DO BRASIL S.A., *et al.*,
Defendant/Appellant.

NOTICE OF WAIVER OF ORAL ARGUMENT

The Appellant, ALCAN ALUMINIO DO BRASIL S.A., by and through its undersigned counsel, files this its Notice of Waiver of Oral Argument and would advise the court as follows:

1. Oral argument is currently set for March 14, 1988 at 10:30 a.m.

2. As a result of this Court's failure to allow Alcan Aluminio do Brasil, S.A.'s personal counsel to orally argue this cause, by virtue of the denial of Mr. Larry Salibra's Motion to Appear pro hace vice, Alcan Aluminio do Brasil, S.A. has determined it does not wish to be forced to pay the enhanced costs in the form of additional outside counsel fees and therefore Alcan waives its request for oral argument.

WHEREFORE, Alcan Aluminio do Brasil, S.A. waives oral argument and requests this Court to render its opinion based upon the briefs submitted by Alcan Aluminio do Brasil, S.A.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MARC L. GOLDMAN, ESQ., 757 NW 27th Avenue, Miami, FL 33125 this 2nd day of February, 1988.

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle, Suite 502
Mailing Address:
P. O. Box 141939
Coral Gables, FL 33114-1939
(305) 446-5100
By: /s/ SHERIDAN K. WEISSENBORN

MOTION FOR REHEARING AND TO CLARIFY DECISION BY WRITTEN OPINION

Case No. 87-1697

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Appellant,

v.

LUCRECIA HERNANDEZ,
Appellee.

MOTION FOR REHEARING AND TO CLARIFY DECISION BY A WRITTEN OPINION

The Appellant, ALCAN ALUMINIO DO BRASIL, S.A., by and through its undersigned counsel files this its Motion for Rehearing and to Clarify the Decision by reducing to writing the reasons of this court for its decision and as grounds therefore would show the following:

1. That the Appellant has been deprived of an opportunity to know what reasons the court relies upon to determine that the lower tribunal has jurisdiction of the proceedings by virtue of the fact that this Court has failed to provide a written opinion. The Appellant would submit that the failure of this court to provide this Appellant with a written opinion is a denial of due process of law and equal protection of the law as guaranteed by the Constitutions of the United States and the State of Florida. The Court has chosen not to write

an opinion in this case while in other cases it has done so; this violates the equal protection clause in that this defendant is being treated differently than other defendants in like situations and by virtue of this court's failure to file a written opinion it is impossible to determine whether this decision is in direct conflict with the Second District Court of Appeal and the Fourth District Court of Appeal in the cases of *Seydelmann v. Altman*, 468 So.2d 286 (Fla. 2nd D.C.A. 1985) and *Phoenix Trimming, Inc. v. Mowday*, 431 So.2d 198 (Fla. 4th D.C.A. 1983). Therefore it is respectfully submitted that the court should grant this motion to clarify and should then write an opinion in order for this Appellant to determine why this court has found that this foreign manufacturer is subject to the jurisdiction of the circuit court of the 11th Judicial Circuit in and for Dade County, Fla.

2. That this Court has overlooked the decision of *Phoenix Trimming*, supra. which holds that the mere fact that a party knows that its property would be used in a state does not give jurisdiction to the court.

3. That the court has overlooked the fact that there is no evidence that the Appellant has purposefully availed itself of the privilege of conducting activities within the state of Florida. See *Asahi Metal Industry Co., vs. Superior Court of California*, 480 U.S. _____, 108 S.Ct. _____, 94 L.Ed.2d 92 (1987). In conjunction therewith this Court has overlooked the fact that the Appellant has done nothing about directing its activities at the residents of the state and that the injuries received by the Appellee, herein, have no connection with the activities of this Appellant directed to this state; there has been no intent to serve this market, no

advertising of the product and no channels of open communication established to provide advise to customers from this market. See *Asahi*, supra.

4. That this Court has failed to consider the dictates of the Supreme Court of the United States in the *Asahi*, case supra. wherein the Court holds that the defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed to the forum state.

WHEREFORE, the Appellant moves this Honorable Court for a rehearing and would respectfully submit that the decision should be reversed and a finding of no jurisdiction should be made. Additionally and at the very least the Appellant would request that this court grant its motion to clarify the decision by the filing of a written opinion.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Appellant was mailed to Marc L. Goldman, Esquire, Stabinski & Funt, 757 Northwest 27th Avenue, Third Floor, Miami, Florida 33125-3093 this 13th day of April, 1988.

PAPY, WEISSENBORN & PAPY
201 Alhambra Circle, Ste. 502
Mailing Address:
P.O. Box 141939
Coral Gables, FL 33114-1939
(305) 446-5100
By: /s/ SHERIDAN K. WEISSENBORN

APPLICATION FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA, TO THE SUPREME COURT OF FLORIDA

Case No.

IN THE SUPREME COURT
STATE OF FLORIDA

ALCAN ALUMINIO DO BRASIL, S.A., *et al.*,
Defendant/Petitioner,

v.

LUCRECIA HERNANDEZ,
Plaintiff/Respondent.

APPLICATION FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

LAWRENCE A. SALIBRA, II
1301 East 9th Street—29th Floor
Cleveland, OH 44114
Attorney for Petitioner
Alcan Aluminum Corporation

SUMMARY OF ARGUMENT

The decision of the District Court conflicts with the decision of the Supreme Court of the United States in *Asahi Metal Industry Company, Ltd. v. Superior Court of California, in and for the County of Solano,* 480 U.S. _____, 108 S. Ct. _____, 94 L. Ed. 2d 92, (1987). In addition, the decision conflicts with the reasoning of the Second District Court of Appeals in *Seydelmann v. Altman,* 468 So. 2d 286 (Fla. 2nd D.C.A. 1985) which is the only case where the Florida courts considered the exercise of *in personam jurisdiction* on a foreign national who had no presence in the United States.

STATEMENT OF THE CASE AND FACTS

Defendant/Petitioner, Alcan Aluminio do Brasil S.A., ("Alcan") is a Brazilian company located and operating exclusively within the boundaries of the country of Brazil. It has no offices in Florida. It is not registered to do business in Florida, nor is it doing business in Florida. It has no property in Florida, either real or personal, it has no agents in Florida and it has not solicited business in Florida.

Alcan did manufacture Rochedo brand pressure cookers. It is an alleged defect in the design or manufacture of a Rochedo cooker which allegedly caused injury to the Plaintiff/Respondent, Hernandez. All Rochedo cookers are designed, manufactured, sold and delivered in Brazil. Alcan's only connection with Florida is that an independent broker, Manual Diaz, who is a resident of Florida, brokered a transaction for the sale of Rochedo cookers to a U.S. wholesaler, bought the cookers, and took delivery of the cookers in Brazil. The entire transaction was governed by Brazilian law.

The cookers were imported into the United States by the U.S. wholesaler and were sold to the Respondent by a U.S. retailer. The Respondent never sued the U.S. wholesaler or retailer for her alleged injuries.

This case arises as a result of a motion to dismiss for lack of *in personam jurisdiction* which was denied by the trial court and an appeal therefrom, which affirmed the trial court. This case was originally filed in state court, but was removed since the plaintiff initially alleged damages in excess of $100,000, well within the $10,000 diversity requirement. Alcan had moved to dismiss the case for lack of *in personam jurisdiction* and its motion was denied. The motion and decision of the trial court predated the U.S. Supreme Court's decision in *Asahi,* a case in which Alcan participated as Amicus Curiae on behalf of Asahi. A copy of that Amicus Brief is attached as Exhibit A.

Sometime during the proceedings in the Federal Court, the plaintiff moved to defeat federal jurisdiction by abandoning her claim to hundreds of thousands of dollars and asserting that her damages had remarkably decreased to less than ten thousand dollars. Approximately at that time, the United States Supreme Court announced its decision in *Asahi.*

In the state trial court, Alcan refiled its motion based on the recent decision of the United States Supreme Court in *Asahi.* The trial judge denied Alcan's motion without opinion. Alcan appealed as a matter of right. The District Court of Appeals affirmed the trial court without opinion. Alcan filed a motion for reconsideration, and in that motion, it requested both reversal or a written opinion describing the reasoning of the District Court of Appeals in not applying the precedent of *Asahi* to this case. The District Court of

Appeals denied our motion for reconsideration in its entirety without opinion and this application for discretionary review follows.

ARGUMENT

THE COURT SHOULD TAKE JURISDICTION OF THIS CAUSE UNDER ART. I, SEC. 3 (B)(3), OF THE CONSTITUTION OF THE STATE OF FLORIDA BECAUSE THE DECISION OF THE DISTRICT COURT BELOW THAT THE TRIAL COURT COULD, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, EXERCISE *IN PERSONAM JURISDICTION* OVER A FOREIGN NATIONAL WHO DOES NOT EXIST IN THE UNITED STATES, CONDUCTS ALL OF ITS OPERATIONS AND SALES OUTSIDE OF THE UNITED STATES AND MAKES ALL DELIVERIES OUTSIDE OF THE UNITED STATES IS CONTRARY TO THE EXPLICIT HOLDING OF THE UNITED STATES SUPREME COURT IN *ASAHI* AND CONTRARY TO ONLY HOLDING OF THE APPELLATE COURTS OF THIS STATE TO HAVE EXPLICITLY ADDRESSED THIS ISSUE.

A. The Reasoning Of *Asahi* Clearly Precludes The Exercise Of *In Personam Jurisdiction* Of The Florida Trial Court Over Alcan, S.A.

The U.S. Supreme Court has recognized that it was unfair to subject an alien to the serious burdens of defending itself in a foreign legal system.

In order to exercise in personam jurisdiction for due process purposes, the United States Supreme Court in *Asahi* stated that two tests must be met. First, the defendant must have sufficient "minimum contacts" with the courts seeking to exercise jurisdiction. Second, the exercise of jurisdiction must conform with "traditional notions of fair play and substantial justice". *Asahi*, 55 U.S.L.W. at 4197.

1. *Alcan, S.A. Stands In Exactly The Same Position In This Matter As Asahi Did In Respect To The Absence Of Minimum Contacts.*

In *Asahi,* 55 U.S.L.W. at 4199, the Supreme Court approved as the governing standard for the minimum contact test the decision of the 8th Circuit Court of Appeals in *Humble v. Toyota Motor Company, Ltd.,* 727 F.2d 709 (1984), whose material facts correspond exactly to the facts of this case. In *Humble,* an injured car passenger brought suit against Arahawa Auto Body Company, a Japanese corporation that manufactured car seats for Toyota. Arahawa did no business in the United States; it had no office, affiliate, subsidiary, or agent in the United States; it manufactured its component parts outside the United States and delivered them to Tokyo in Japan.

Alcan, S.A. is in exactly the same position as Arahawa. It does no business in the United States; it has no office, affiliate, subsidiary, or agent in the United States; it manufactured its parts outside the United States and delivered them to its customers in Brazil. (See Affidavit of Edward Rugeroni, President of Alcan, S.A., attached hereto as Exhibit B).

In fact, given the obvious market of Toyota, Arahawa stood in an even less compelling position than Alcan, S.A. does in this matter. Notwithstanding, Arahawa's sales to Toyota and the obvious destination of its product, the 8th Circuit stated:

> [a]lthough it does not doubt that Arahawa could have forseen that its parts were on its way to the United States", "it would be manifestly unjust to require Arahawa to defend itself in the United States." See *Humble,* F2d at 710-711, quoted in *Asahi,* 55 U.S.L.W. at 4199.

The second part of the minimum contacts test when it was reaffirmed by the Supreme Court in *Asahi* is a requirement that the act giving rise to the minimum contacts must be such that the Defendant "invokes the benefits and protections of its laws", *Asahi,* 55 U.S.L.W. at 4198. Alcan, S.A. in its amicus brief urged the Court to reaffirm this principle, stating that it gave aliens a "fair and objective" standard upon which to assert jurisdiction if the aliens manufacturing and sales activities benefited from Florida law, it was fair to impose liability.

One need simply ask what benefits of the Florida law has Alcan, S.A. invoked? The answer is quite obvious, none. Any privileges it has are strictly under Brazilian law. Without the benefits of Florida law, the imposition of liability would be patently unfair.

2. *The Application Of In Personam Jurisdiction Must Conform With Traditional Notions Of Fairness.*

Beyond the question of contacts, the Plaintiff must show that traditional notions of fair play and substantial justice permit the exercise of jurisdiction. *Asahi,* 55 U.S.L.W. at 4200. The Supreme Court cites three areas

to be evaluated in making a determination of fairness; (1) the burden on the defendant; (2) the interests of the forum state; and (3) the plaintiff's interest in obtaining the relief.

First, consider the interest of the plaintiff in obtaining the relief. In personam jurisdiction, would not have left the plaintiff without a remedy. In fact, the plaintiff in this case would have a remedy against both the importer-distributor, who is a Florida resident, and the Florida retailer. The plaintiff voluntarily chose not to sue either of these parties so its present lack of a remedy is one of its own making.

The second area is the interest of the forum state. The interest of Florida is even more attenuated. The first arguable interest is that Florida might have an interest in seeing that its wholesaler was indemnified. However, any indemnity would be in contractual arrangements of sale, all clearly governed by Brazilian law—an issue best left to the Brazilian courts. This is especially true since Alcan, S.A.'s non-existence in the United States and Florida would make Florida completely dependent on the Brazilian courts for their review, concurrence in enforcement of a Florida judgment.[1] Further, the Florida wholesaler is not even a party to this case.

The second argument for Florida's interest is the insurance of safe products in Florida, and that interest was specifically rejected by the Supreme Court in *Asahi* which noted that the market forces would insure safe products as long as the seller of the products was subject to the forum's law:

---

[1] Moreover, it should not be assumed that even if jurisdiction were proper that Florida law could govern this case. It is Alcan, S.A.'s position that the foreign commerce laws of the United States Constitution would require Brazilian law to apply.

> The Supreme Court of California argued that the state had an interest in "protecting its consumers by insuring that foreign manufacturers comply with the State's safety standards . . . The possibility of being haled into a California court as a result of an accident involving Asahi's components, and that only creates an additional deterent to the manufacturer of unsafe components. However, similar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law. *Asahi,* 55 U.S.L.W. at 4200.

Thus, we can see that the Plaintiff has a remedy for her alleged injury and Florida has little or no interest in exercising jurisdiction which, even if it were exercised, is necessarily dependent upon the Brazilian courts for enforcement.

Finally, one must evaluate the interest of the plaintiff in this case. Clearly the objective in this case is to take advantage of the serious burdens on alien defendants. The Supreme Court noted in *Asahi* that courts should not require an alien that otherwise does not function in the United States to defend a case here. The Court stated that courts should have "an unwillingness to find the serious burdens on alien outweighed by the minimal interest on the part of the plaintiff or the forum state". *Asahi*, 55 U.S.L.W. at 4200. In this case, the plaintiff's only interest is to use the serious burden to force a settlement irrespective of the merits of the lawsuit.

Although initially claiming $150,000 in damages, the plaintiff has defeated diversity jurisdiction by now limiting her remedy to less than $10,000 knowing that it has to be far much less expensive for an alien to pay the $10,000 rather than defend a meritless claim halfway around the world. It is this type of abuse the Supreme Court recognized in *Asahi* and required the courts to prevent because it knew that permitting such conduct would ultimately have a negative impact on foreign relations. Therefore, since jurisdiction was rejected on equivalent facts in *Asahi*, it must be rejected by this Court.

B. The Only Florida Decision To Explicitly Deal With The Application Of *In Personam Jurisdiction* On A Nonresident Foreign National Is Comparable To The Facts In This Case, Consistent With The Principles Of *Asahi* And Concludes That The Exercise Of Jurisdiction Is Improper.

The only reported Florida court to explicitly address the propriety of the application of *in personam jurisdiction* to a foreign national is *Maschinenfabrick Seydelmann v. Altman*, 468 So. 2d 286 (1985). That case is virtually identical to the present case except in two respects. First, the German defendant had a considerably longer and more established relationship with the Florida distributor than Alcan did with the broker, Diaz, and second, the product which was claimed to have caused the injury was a meat grinder rather than a pressure cooker.

In all other respects, the cases are essentially the same. Seydelmann designed, manufactured, sold and delivered its meat grinders in Germany, just as Alcan

did with its pressure cookers in Brazil. In refusing to find the needed contacts, the Second District, using the same logic as the courts in *Asahi* and *Humble*, stated:

> Seydelmann carries on no discernible activities in Florida. The only nexus between Seydelmann and Florida is the presence in Florida of meat grinders manufactured by Seydelmann in Germany.
>
> The minimum contact test is not met by showing that manufacturer could foresee that his product would be used in a particular state and that he derived some indirect economic benefit from its use. Before a long arm statute may constitutionally be used to obtain jurisdiction over a nonresident defendant, some evidence must be presented to show that the defendant "purposely (availed) itself of the privilege of conducting activities within the forum state." *Hanson v. Denkla*, 357 U.S. at 253, . . . No such evidence exists in this case.

Maschinenfabrik, supra. at 290.

Thus, it is clear that the decision of the Third District Court of Appeal in this case has not only ignored the controlling precedent of the United States Supreme Court, it is clearly inconsistent with the existing precedent of the Courts of this State.

CONCLUSION

In *Asahi*, the Supreme Court stated:

> "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

In discharging this obligation, the Supreme Court required a "careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case". The Fourth District has apparently not taken that charge seriously. Whereas Alcan has detailed the unreasonableness of the exercise of jurisdiction in this case, neither the trial court or the Fourth District has offered any explanation as to why the exercise of jurisdiction is proper. It has not challenged Alcan's reasoning, nor has it demonstrated that there is any significant difference between the facts of this case and *Seydelmann*. For the foregoing reasons, Alcan requests that this Court enter its order granting jurisdiction of this case.

Respectfully submitted,

LAWRENCE A. SALIBRA, II
100 Erieview Plaza—29th Floor
Cleveland, OH 44114
(216) 523-6918
Attorney for Defendant
Alcan Aluminum Corporation

Of Counsel:
Papy, Weissenborn & Papy
201 Alhambra Circle
Coral Gables, FL 33134

PROPOSED LEGISLATION:

S1996
H.R. 3662

THE NEED FOR THE ENACTMENT OF THE "EQUAL ACCESS TO JUSTICE ACT OF 1987"

Congress has been giving serious attention to trade reform legislation in this session. This concern about tariffs and quotas is sound, since a number of foreign nations are pursuing trade policies that place American companies and workers at a competitive disadvantage. What has been largely overlooked in the process, however, is the need to reform those aspects of our judicial system that place both American businesses and American consumers at a disadvantage in lawsuits involving foreign claimants or manufacturers.

Specifically, American businesses are hurt by the American judicial system, because the system enables foreign nationals to take advantage of our uniquely broad standards of legal responsibility and damages and to apply those standards to American business conducted overseas. By contrast, foreign competitors in those markets are subject only to the far more less generous laws of the foreign jurisdiction in which they are selling their products.

This disparity of treatment exposes American businesses to far more sweeping financial exposure in connection with their sales to purchasers abroad than their foreign counterparts face. This situation—which is the result of our own doing and not of unfair trade practices originating abroad—unnecessarily places American businesses at a competitive disadvantage in world markets.

At the same time that we are subjecting American businesses to higher levels of financial exposure for their foreign activities, our judicial system has failed to protect the interests of American consumers. Our laws are deficient in failing to apply the principle that foreign producers should be fully subject to the same exposure as American businesses when they sell goods to American citizens in this country. This problem arises because Congress has not prescribed uniform, modern jurisdictional rules that would make it possible for American consumers to hold foreign producers accountable in American courts.

The Equal Access to Justice Act of 1987 is designed to address both of these problems and thereby put American businesses on an equal footing with their foreign competitors within the context of our judicial system. The Act has three main provisions designed to accomplish this goal.

The first provision would allow any American business to remove to federal court any suit brought by a foreign national whose alleged injury arose out of the manufacture, purchase, sale or use of an American business's product abroad. Since these suits involve foreign nationals and often raise issues of foreign law, federal courts are especially appropriate forums to hear the cases.

The second provision is a choice-of-law statute. It would require federal courts in these cases to apply the substantive law of the foreign jurisdiction in which the foreign claimant was allegedly injured. Thus, the law of the place where the injury allegedly occurred would determine questions of liability and damages. This provision would ensure that American companies would

be subject to the same financial exposure—no more and no less—that their foreign competitors would be facing under similar circumstances in foreign markets.

The third provision of the Act would establish a federal "long arm" statute. It would enable American consumers injured in this country by products manufactured abroad to obtain personal jurisdiction over foreign companies in American courts. All that would be necessary for the injured American consumer to show for jurisdictional purposes would be that the foreign company knew or reasonably should have known that its product would be imported for sale in the United States. This provision would also adopt a flexible mechanism for extraterritorial service of process and thus would make it easier for injured American consumers to bring foreign companies before United States courts. With the enactment of this provision, foreign producers of goods exported to this country would be less likely to escape the financial responsibilities they should bear when their defective products injure American consumers.

Judged on principles of fairness alone, these legislative proposals are meritorious. Judged in the context of today's international trade picture, these proposals are essential.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECEIVED
OCT 1 - 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-377

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

MARC L. GOLDMAN, ESQ.
STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125
(305) 643-3100

NO. 88-397

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

MARC L. GOLDMAN, ESQ.
STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125
(305) 643-3100

TABLE OF CONTENTS

ITEM	PAGE
TABLE OF AUTHORITIES	3
QUESTIONS PRESENTED	4
JURISDICTION	5
STATEMENT OF THE CASE AND FACTS	6-7
SUMMARY OF ARGUMENT	8
ARGUMENT	9-15
CONCLUSION	16

APPENDIX:

DEPOSITION OF MANUEL SOSA (MAY 20, 1986)	A-1-69
PLAINTIFF'S MOTION FOR REMAND (SEPTEMBER 18, 1986) AND ORDER GRANTING THIS MOTION	B1-3
SUPREME COURT OF FLORIDA ORDER DISMISSING PETITION FOR REVIEW	C-1

TABLE OF AUTHORITIES

CASE — PAGE

Allstate Finance Corporation v. Zimmerman
296 F.2d 797 (5th Circuit 1961).....9

American Baseball Cap, Inc. v. Duzinsky
359 So.2d 483 (Fla. 1st DCA 1978).....12

Asahi Metal Industry Company, Limited v. Superior Court of California, Solano County
__US__, 107 S.Ct. 1026, __L.Ed.__2d__, 55 USLW 4197, (1987)...13

Burger King v. Rudzewicz
105 S.Ct. 2174 (1985).....11, 14

Hill v. United States Fidelity and Guaranty Company
428 F.2d 112 (1970).....9

Humble v. Toyota Motor Company, LTD.
727 F.2d 709 (1984).....13

International Shoe Company v. Washington
326 U.S. 310 (1945).....11, 14

Law offices of Evan I. Fetterman v. Inter-tel, Inc.
480 So.2d 1382 (Fla 4th DCA 1985).....12

Maschinenfabrik Seydleman v. Altman
468 So.2d 286 (Fla. 2d DCA 1985).....13, 14, 15

Title 28 Section 1254 (1988).....5, 16
Title 28 Section 1257 (1985).....5
Title 28 Section 1292 (b) (1985).....9
Fla. Stat. Section 48.181(c) (1985).....12
Fla. Stat. Section 48.193(1)(f)(2)(1985).....11
Fed.R.Civ.P. 60.....9
Fla.R.App.P. 9.130(g).....9
Fla.R.Civ.P. 1.540.....10

QUESTIONS PRESENTED

1) Can the Supreme Court's jurisdiction be invoked under 28 U.S.C. Section 1254 through a petition of certiorari arising from a state court order dismissing a petition for review where the state court could not exercise jurisdiction and thus, never reached the issues under which Petitioner brings its constitutional challenge?

2) Where a foreign corporation being sued for damages in federal court in Florida moved to dismiss for lack of personal jurisdiction and the court denied the motion and on remand to the Florida state court, the foreign corporation moved for summary judgment on precisely the same issue, did the state court have jurisdiction to rehear the issue?

3) Does the Florida Long Arm Statute in accordance with the Due Process Clause of the Constitution of the United States afford personal jurisdiction over a foreign corporation which manufactures a finished product and places the finished product into the stream of commerce and it is reasonably expected to reach Florida?

JURISDICTION

The Supreme Court has no jurisdiction in this case. The Petitioner cites 28 U.S.C. Section 1254 as the section which invokes the Supreme Court's jurisdiction. However, 28 U.S.C. Section 1254 determines how this Court acquires jurisdiction over cases from the federal courts of appeals. This petition arises out of an order rendered by the Florida Supreme Court, not a federal court of appeals. The appropriate section which determines Supreme Court jurisdiction over a case arising out of state court actions is 28 U.S.C. Section 1257. Nevertheless, section 1257 does not confer jurisdiction upon this Court over the matter at bar. The Florida Supreme Court never entered a final judgment or decree dealing with any matter within the purview of 28 U.S.C. Section 1257(3) the only statutory provision that could provide the basis for this Court's exercise of jurisdiction of the instant matter. (See Appendix C). Therefore, the Petitioner has inappropriately petitioned the Court to hear its constitutional argument. Petitioner has made a gross error in his attempt to invoke Supreme Court jurisdiction. Clearly, his petition should be denied.

STATEMENT OF THE CASE AND FACTS

Petitioner, ALCAN ALUMINIO DO BRASIL, S.A. (ALCAN BRASIL), manufactured the Rochedo pressure cooker in finished form in Brazil. ALCAN BRASIL has no office in Florida, nor is it registered to do business in Florida. However, Manuel Diaz of 1402 Northwest 82nd Avenue, is the wholesaler/distributor of ALCAN BRASIL's products in Florida. He is the sales representative of ALCAN BRASIL (A.6), and has been their representative in Miami since 1973 (A.28). The export manager for ALCAN BRASIL made his first trip to Florida in 1974 and continuously makes trips to Florida, usually two (2) to three (3) times per year to deal with Mr. Diaz (A.22-23). Mr. Diaz received sales commissions from ALCAN BRASIL for his sales of their products in Florida (A.7 and 35). ALCAN BRASIL ships its pressure cookers to Mr. Diaz in Miami (A.9). ALCAN BRASIL also ships directly to Mr. Diaz's customers in America, if so directed (A.10). It was through the efforts of, among other Latin-American manufacturers, ALCAN BRASIL, that Mr. Diaz's company, Group Brasil, Inc., was started in Miami, Florida.

On or about February 22, 1981, while properly using one of the Petitioner's pressure cookers, the Respondent was severely injured when, due to a defect in the pressure cooker, it violently exploded. This pressure cooker was among an abundance of defective pressure cookers manufactured by ALCAN BRASIL that had reached Florida. In January, 1984, ALCAN BRASIL, recalled all Rochedo pressure cookers manufactured between the years 1977 and 1982. To conduct this recall in Florida, advertising of the recall was placed in Miami papers directing customers who have the defective pressure cookers to exchange them for new models, through Group Brasil, Inc., located at 1402 Northwest 82nd Avenue, Miami; Manuel Diaz's company (A.26).

This action was brought in state court in Dade County, Florida. It was then removed to federal court pursuant to diversity jurisdiction. ALCAN BRASIL moved for dismissal for lack of personal jurisdiction; that motion was denied on January

23, 1986. ALCAN BRASIL never moved for rehearing of the jurisdictional issue. The case was remanded to state court after Respondent stipulated that the amount in controversy was under TEN THOUSAND DOLLARS ($10,000.00). (Appendix B.1-2). The Petitioner, ALCAN BRASIL, filed what was denominated as a "Renewed Motion for Summary Judgment in the Florida state court after remand."

There never was a Motion for Summary Judgment; the Petitioner was procedurally seeking relief from judgment pursuant to Florida Rule of Civil Procedure 1.540, but had failed to make even the slightest attempt to allege a single fact to support such relief. Further, that relief was no longer available to the Petitioner due to its failure to timely move within one (1) year.

On July 7, 1987, the trial court entered an order denying Petitioner's Motion for Summary Judgment.

The Third District Court of Appeals of Florida affirmed the trial court's decision and subsequently denied Petitioner's request for reconsideration. After Petitioner requested that the Florida Supreme Court invoke discretionary review of the case, that court dismissed the petition for discretionary review as it was without jurisdiction to hear the matter. It is from that order that this petition arises.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari is without merit in this case. There are no unresolved issues of public importance regarding either the procedural or substantive merits of this case. The Florida courts' orders regarding those issues follow controlling case and statutory law, as well as comport with constitutional due process requirements.

The Petitioner's Renewed Motion for Summary Judgment was procedurally incorrect in that there had been no original Motion for Summary Judgment. The state court was without jurisdiction to hear Petitioner's motion since the issue had been resolved by the federal court on Petitioner's Motion to Dismiss for Lack of Personal Jurisdiction. The Petitioner was attempting to seek relief from judgment pursuant to Fla.R.Civ.P. 1.540. However, the Petitioner failed to make any showing of grounds for such relief.

Beyond the foregoing procedural defects in Petitioner's motion in the state trial court, Petitioner's position is completely void of substantive merit. The facts set forth in the deposition of Manuel Sosa Diaz (A.1-68), as presented to the trial court, clearly indicate that the courts of Florida have personal jurisdiction over the Petitioner.

Finally, Petitioner's charges that the Florida courts have acted improperly are devoid of any truth or merit and are nothing more than empty, self-serving statements, to provide food for Petitioner's counsel to feed his ego. In fact, one of the cases upon which Petitioner relies to support its argument is a recent Florida appellate decision which the Florida Supreme Court denied rehearing on.

ARGUMENT

I. WHERE A FOREIGN CORPORATION BEING SUED FOR DAMAGES IN FEDERAL COURT IN FLORIDA MOVED TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND THE COURT DENIED THE MOTION AND ON REMAND TO FLORIDA STATE COURT, THE FOREIGN CORPORATION MOVED FOR SUMMARY JUDGMENT BASED ON PRECISELY THE SAME ISSUE, THE STATE COURT DID NOT HAVE JURISDICTION TO REHEAR THE ISSUE.

DISCUSSION

The Florida state court did not have jurisdiction to hear ALCAN BRASIL's "Renewed Motion for Summary Judgment." The proper procedural avenues which ALCAN BRASIL could have taken were to either move for rehearing pursuant to Fed.R.Civ.P. 60 or to appeal the denial of the Motion to Dismiss for Lack of Personal Jurisdiction. Under Title 28, Section 1292(b) U.S.C., the district judge had the power to indicate in his order that the denial of ALCAN BRASIL's motion was a controlling question of law that could have materially advanced the ultimate termination of the litigation. This would have afforded ALCAN BRASIL an immediate right of appeal of the nonfinal interlocutory order. ALCAN BRASIL failed to avail themselves of this right. ALCAN BRASIL will still be able to appeal the denial of its Motion to Dismiss for Lack of Personal Jurisdiction after final judgment. Fla.R.App/P. 9.130(g) states: "This rule shall not preclude initial review of a nonfinal order on appeal from the final order in the cause."

What ALCAN BRASIL was attempting to do was have the same issue that was decided by a court of competent jurisdiction, and is thus, res judicata, heard again by the state trial court in the form of a Summary Judgment. The trial court had no jurisdiction to hear the Motion for Summary Judgment after the issue was already settled in the same case. See, Allstate Finance Corporation v. Zimmerman, 296 F.2d 797 (5th Circuit 1961). The denial of ALCAN BRASIL's motion was made while the case was in good standing in federal court. Upon remand all decisions until the point of remand are valid upon the state court. See, Hill v. United States Fidelity and Guaranty Company, 428 F.2d 112 (1970).

What ALCAN BRASIL was actually doing was moving for relief from judgment under Fla.R.Civ.P. 1.540. However, ALCAN BRASIL fatally slept on this option for hearing. Rule 1.540 states: "The motion shall be made within a reasonable time, and for reasons one, two, or three not more than a year after the judgment, decree or other proceeding was entered or taken." The order denying ALCAN BRASIL's Motion to Dismiss was entered a year and a half prior to the motion subject of this appeal. Further, and perhaps more compelling, is that ALCAN BRASIL failed to assert the slightest basis for such relief. It cited a recent case in its motion. Not only is the case inapplicable (discussion of Issue II, infra), but new law, even if applicable, is not a grounds for relief under Rule 1.540.

The trial court was without jurisdiction to hear ALCAN BRASIL's "Renewed Motion for Summary Judgment." Other than ALCAN BRASIL's right of appeal from final judgment, ALCAN BRASIL is foreclosed from any hearing on the jurisdictional issue raised.

ARGUMENT

II. THERE ARE NO UNRESOLVED SUBSTANTIVE ISSUES OF PUBLIC IMPORTANCE IN THIS CASE, AND THE FLORIDA COURTS' RULINGS IN THIS MATTER HAVE BEEN CONSISTENT WITH CONTROLLING CASE AND STATUTORY LAW, AS WELL AS CONSTITUTIONAL DUE PROCESS REQUIREMENTS. WHERE A FOREIGN CORPORATION MANUFACTURES A FINISHED PRODUCT AND PLACES THE FINISHED PRODUCT INTO THE STREAM OF COMMERCE AND IT IS REASONABLY EXPECTED TO REACH FLORIDA, THE FLORIDA LONG ARM STATUTE AFFORDS PERSONAL JURISDICTION OVER THAT FOREIGN CORPORATION.

In order to maintain personal jurisdiction over a foreign corporation, due process requires that the foreign corporation have certain minimum contacts with the state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Company v. Washington, 326 U.S. 310 (1945). The recent case of Burger King v. Rudzewicz, 105 S.Ct. 2174 (1985), clarified the minimum contact requirement by stating that when a party reaches out and creates continuing obligations with the state, he would reasonably foresee being brought into court. ALCAN BRASIL sold the pressure cookers to its representative in Florida and directly shipped to Group Brasil, Inc. (a Florida corporation), and to Group Brasil's customers in both Florida and throughout America. ALCAN BRASIL knew that these goods would be used in Florida. ALCAN BRASIL sent an export manager to the United States two (2) to three (3) times a year to check on the sales efforts of the representatives of ALCAN BRASIL. Additionally, ALCAN BRASIL instituted a recall in Florida and conducted this recall of the same model pressure cookers subject of this action that reached Florida in the expected stream of commerce. Although the recall, in and of itself, may not be determinative of minimum contacts, combined with the foregoing facts, it is beyond question that ALCAN BRASIL had sufficient ties with Florida. Judge Scott, presiding in the federal court case prior to remand, denied ALCAN BRASIL's Motion to Dismiss for Lack of Personal Jurisdiction and noted these same findings.

Florida's long arm statute, Section 48.193(1)(f)(2) Fla. Stat. (1985) states:

> (1) any person, whether or not a citizen or resident of this state, who personally or through an agent, does any of the acts enumerated in this subsection, thereby submits himself and, if he a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts. (f) causing injury to persons or property within this state arising out of an act or omission by the Defendant outside this state, if, at or about the time of the injury, either; (2) products, materials, or things processed, serviced, or manufactured by the Defendant anywhere or used or consumed within this state in the ordinary course of commerce, trade or use.

Clearly, ALCAN BRASIL comes under Florida's long arm jurisdiction.

Since the injury in Florida was caused by a product manufactured in Brazil, the relevant question is whether the product reached Florida under circumstances comporting with the requirement of Section 48.181(c) Florida Statute (1985), which states:

> Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers, or distributors to any person, firm or corporation in this state is conclusively presumed to be both engaged in substantial and not isolated activities within this state and operating, conducting, engaging in, or carrying on a business or business venture in this state.

The foreign corporation must exercise some control over either the personal property or the broker, jobber, wholesaler, or distributor in the state. Law Offices of Evan I. Fetterman v. Inter-tel, Inc., 480 So.2d 1382 (Fla. 4th DCA 1985); American Baseball Cap, Inc. v. Duzinsky, 359 So.2d 483 (Fla. 1st DCA 1978. ALCAN BRASIL exercised the requisite control over its representative Diaz and Group Brasil, Inc. by its initiative to create the company, by shipping its products to Group Brasil, Inc. in Miami, shipping directly to Group Brasil's customers throughout the United States; fixing and paying commissions to Diaz for his sales of ALCAN BRASIL products in the United States; and by its continuous and deliberate contact with Florida over more than a decade through its export manager's bi- or tri-yearly

sales visits.

ALCAN BRASIL relies upon Asahi Metal Industry Company, Limited v. Superior Court of California, Solano County, __US__, 107 S.Ct. 1026, __L.Ed.__2d__, 55 USLW 4197, (1987); Humble v. Toyota Motor Company, LTD. 727 F.2d 709 (1984); Maschinenfabrik Seydleman v. Altman, 468 So.2d 286 (Fla. 2d DCA 1985), as its grounds for the state court's lack of personal jurisdiction. ALCAN BRASIL claims that the facts of each of these cases are on all fours with the case at bar. In actuality, these cases teeter on a single claw at best. In Asahi Metal, assemblies for a tire were manufactured in Taiwan by Asahi, and were then shipped to the Japanese tire manufacturer who produced the finished product. Eventually, the tire, which contained the assemblies made by Asahi were shipped to the United States by the Japanese tire manufacturer as a finished product. The Court ruled that there was no personal jurisdiction over Asahi who only manufactured a part of a product and that the part was not shipped nor expected to reach in its part only form (emphasis added), anywhere other than Japan. Similarly, Humble manufactured car seats for Toyota. The seats were manufactured outside of the United States and delivered to Japan for Toyota to put in its cars. Toyota then shipped the cars to the United States; the finished product contained the part manufactured by Humble. The facts of these cases are not similar to those at bar. ALCAN BRASIL manufactured and shipped the finished product; not a small part of a larger machine. The finished product was shipped directly into Florida by ALCAN BRASIL.

ALCAN BRASIL also relied upon Seydleman. In Seydleman, products were sold to a third party and Seydleman had no control after the sale of the products. Seydleman had no agent, salesman, or distributors in Florida. Seydleman had no knowledge as to the final destination of the products. There was no reasonable expectation of being brought into court in Florida. This is clearly not the facts of this case. As the present facts indicate, ALCAN BRASIL ships directly to the United States, not

to another company which subsequently and unknown to ALCAN BRASIL, brought the product into Florida. The case before this court is consistent with Burger King, International Shoe, and all attendant authorities. Further Seydleman was considered and rejected by the federal court in its denial of ALCAN BRASIL's Motion to Dismiss for Lack of Personal Jurisdiction prior to remand.

ARGUMENT

III. Petitioner's CHARGES OF THE FLORIDA COURTS' IMPROPRIETY ARE DEVOID OF MERIT OR TRUTH.

Petitioner's charges asserted by its counsel are the ravings of a man who appears obsessed with seeing his name on the pages of the Supreme Court Reporter. Petitioner has already spent probably in excess of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) on a case which contained no novel issues and where the Plaintiff sought damages that did not exceed NINE THOUSAND NINE HUNDRED AND NINETY-NINE DOLLARS ($9,999.00). (See Appendix B). However, Petitioner now claims that the Florida appellate court's denial of pro hac vice status for its house counsel, Mr. Salibra, created such an extreme financial burden that the Petitioner was forced to waive oral argument and thus prejudiced. Clearly, the Petitioner is reaching for any argument, no matter how frivolous, to gain access to the highest court of the land.

Additionally, one of the cases upon which Petitioner most heavily relies to support its position is Maschinenfabrik Seydelmann v. Altman, 468 So.2d 286, (Fla. 2d D.C.A. 1985) which is, of course, a Florida appellate court case.

CONCLUSION

Based on the foregoing facts and authorities, the state court has properly decided the issues in this case. Thus, the petition for certiorari is completely void of substantive merit. Moreover, the Supreme Court's jurisdiction cannot be properly invoked in this matter under 28 U.S.C. Section 1254 or any other statute.

Respectfully submitted,

STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125-3093
Telephone: (305) 643-3100

By: MARC L. GOLDMAN, ESQ.

(5464BRIE)

RECEIVED
OCT 1 - 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL JR.
CLERK

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CIVIL DIVISION

NO. 85-2729 CIV-Scvott

LUCRECIA HERNANDEZ,

Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL, S.A.

Defendant.

Third Floor,
757 Northwest 27th Avenue,
Miami, Florida 33125,
May 20, 1986,
1:00 p.m.

DEPOSITION OF MANUEL SOSA DIAZ

taken before Sandra Lish, Notary Public in and for the State of Florida at Large, pursuant to Re-Notice of Taking Deposition filed in the above cause.

- - - - -

APPEARANCES:

STABINSKI AND FUNT, P.A.,
(By: MR. MARC L. GOLDMAN),
Third Floor,
757 Northwest 27th Avenue,
Miami, Florida 33125,
on behalf of the Plaintiff.

PAPY, POOLE, WEISSENDORF & PAPY,
(By: MR. STEPHEN A. PAPY),
Suite 502,
201 Alhambra Circle,
Coral Gables, Florida 33134,
on behalf of the Defendant.

- - - - -

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
MANUEL SOSA DIAZ	3	43	50, 66	59, 67

E X H I B I T S

PLAINTIFF'S FOR IDENTIFICATION	PAGE
No. 1	14
No. 2	19
No. 3	19
No. 4	25
No. 5	41
No. 6	41
No. 7	41
No. 8	63
No. 9	63
No. 10	66

THEREUPON:

MANUEL SOSA DIAZ

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Would you please state your full name and address for the record, sir?

A. Manuel Alberto Diaz Sosa, S-o-s-a. And my address is 12442 Southwest 26th Street. That's Coral Way, but it's 26th Street.

Q. Is that your home address, Mr. Sosa?

A. Mr. Diaz.

Q. It's Diaz?

A. Diaz.

Q. I guess we will clear that up, too.

A. Diaz Sosa. Sosa is my mother's last name. Diaz is my father's last name. I use both always, as a habit, in Cuba.

Q. Is that your home address, Mr. Diaz?

A. Yes, sir.

Q. Are you currently employed, Mr. Diaz?

A. Self-employed.

Q. Yes, what do you do?

A. I represent, I am the sales representative of

several manufacturers.

Q. Can you name them, please?

A. From the United States, I represent Pioneer Plastics. They make plastic laminates, like Formica, for instance. Our brand is Pionite.

From Brazil, I represent Alcan Aluminio Do Brasil. They manufacture aluminum kitchenware.

Q. Where is your business?

A. I haven't finished.

Q. Oh, I'm sorry.

A. Alcan Aluminium.

The other one is, I will have to spell that for you, M-e-l-h-o-r-a-m-e-n-t-o-s.

The other one is K-l-i-n-m-e-k.

The other one is T-e-r-m-o-l-a-r.

The other one is P-i-c-h-l.

The other one is M-e-i-s-t-e-r.

There are some reps that have 20 manufacturers. Meister. And there are two more to come, still not confirmed.

I work on a freelance, on a commission basis.

Q. Where do you run your business from? What's the address you run your business from?

A. From my home address. I mean, I have an office now.

Q. Yes, sir. What's your office address?

A. 7875 Northwest 12th Street, Suite 110.

Q. Could we have the phone number there, please?

A. Yes, 593-2262.

Q. Have you ever been associated with a company known as Group Brazil, Inc.?

A. I am the president of Group Brazil.

Q. What does Group Brazil do?

A. It's a warehouse. We began with that project on July 1, 1993. That was the first one we moved in.

The project was not related with Rochedo recall.

The idea was to join a group of different Brazilian manufacturers to put some stock here in Miami, in order that the sales representatives of these manufacturers, that were interested in making a breakthrough in the States, could have two options, when they would visit their customers, not myself only, but 20 other sales representatives.

The two options were, they go to a prospect buyer. You went to bring directly a full container of merchandise from Brazil to the States, they wrote the order, and sent it to the manufacturer.

You're not sure that the merchandise would sell well. Okay? You have your second option. You

make a trial with a small trial order that was shipped from the Miami warehouse to their warehouses.

In other words, Brazil was to service the manufacturers and help them to make a breakthrough in the States.

Q. Let me ask you this: When you say the manufacturers' sales representatives--

A. Yes.

Q. --is that what you do?

A. I am a sales representative, but the manufacturers that I represent as a salesman, they also have another sales representative in the United States.

Q. Okay. I am trying to understand exactly how these transactions work.

Do you, as a sales representative, make purchases from the manufacturers' representatives here?

A. No, no. Let me explain.

Q. Please.

A. Let's say that you're a wholesaler here in the United States.

Q. Okay.

A. And that I am the sales representative in that territory for Alcan, or for any other manufacturer.

I go to your office, I quote the prices and

the terms that the manufacturer determines, and I quote you the prices, I show the samples, if I have, for the catalogs, and you make the decision to buy or not to buy to the manufacturer.

So, I write the order. I send it to the manufacturer. And, then, when he receives the order, the manufacturer ships you directly.

You pay directly to the manufacturer through a bank, or whatever terms are agreed, and that's it.

Q. Then--I'm sorry?

A. For that effort, I get a sales commission as a sales representative.

Q. From?

A. From the manufacturer.

Q. Very good.

A. Once the customer pays. If I don't sell, I have no sales commission.

In other words, they don't give me an allowance, or they don't give me a salary, or nothing else. Like a freelance.

Q. I understand.

A. In that position, today I think that there are--I don't know, the factory might tell you--around 20 sales representatives spread all around the United States.

Q. We are talking about related to Group Brazil, Inc.?

A. No, Group Brazil had no salesmen. Group Brazil was not a wholesale operation. Our only salary was to receive and to ship to anyone that would not buy directly from the manufacturer.

Q. Okay. A couple of questions come into mind here.

A. Yes.

Q. In the hypothetical situation that we were discussing where you referred to me as the wholesaler?

A. That is right.

Q. In other words, I would then sell to the retail outfits in this type of situation?

A. Yes, sir.

Q. Okay. But Group Brazil, Inc., if I understand correctly, would warehouse products?

A. Yes.

Q. That someone in my position didn't want to have shipped directly to me?

A. Yes.

Q. Is that correct?

A. Yes.

Q. In that case would Group Brazil, Inc., have dealt directly with retailers?

A. No. I mean, with retailers or--

Q. Yes. In other words, if I, as a wholesaler who dealt with retailers--

A. (Nods head.)

Q. --didn't get my shipment directly from the manufacturer?

A. Yes.

Q. Explain to me how Group Brazil, Inc., would come into the picture?

A. Okay. The manufacturer will ship on a consignment basis to Group Brazil.

When any salesman, in Chicago, whatever, writes an order to anybody, one of their customers, which I don't know, they have their own customers, they send me the order, the trial order, because they don't want to receive directly a big cargo.

Q. One second, if I may.

In other words, the Group Brazil, Inc., came into play for the option two that you described?

A. That is right.

Q. If I didn't want to get a whole carton from overseas, I can get my small shipment from you?

A. That is right, from Group Brazil.

Q. And then later in time if I wanted to change the arrangement--

A. Yes.

Q. --we could go to option one?

A. The original idea to create Group Brazil was to make the prospect customers be sure that to buy this determined product was good business.

You go to offer or to quote a product to anybody around in the States, a foreign country, they say, "Well, perhaps the sample is very beautiful, but what comes later is not as good as the sample is."

So, they are cautious.

Q. I understand.

A. Once they get confidence in the product, they start buying directly, or perhaps they continue buying locally for their own convenience, not to invest too much or whatever.

Q. Very good. Do you do your representation of the different manufacturers we have described through Group Brazil, Inc.?

A. No. One thing is Group Brazil, Inc. It was a project to make a break--to help the manufacturers make a breakthrough in the market.

My business, my source of income is acting as a self-employed sales representative, not only to one manufacturer, but to all of these described, and those that I might get later on.

Q. I see.

A. That's my source of income.

Q. Is Group Brazil, Inc., still in existence?

A. It is, but it's not working. It's not working because, I don't know, I think that the purpose for some manufacturers has already been accomplished, and they are not new manufacturers that would like to go into this process of making a breakthrough.

So, Group Brazil is not a profitable organization.

In other words, to the cost of the merchandise, we would add only an approximate percentage to cover the operational expenses, period, nothing else.

We were not acting as wholesalers, just as to try to help the manufacturers get into the market.

MR. GOLDMAN: Go off the record for a second, Sandy.

(Discussion held off the record.)

MR. GOLDMAN: You can go back on the record.

BY MR. GOLDMAN:

Q. Did you bring any records or documents with you today pertaining to the subpoena that you received?

A. I brought some, but if I would bring all of what you're going to see, I need a truck, because,

remember, that we had to make a recall, and awhile ago with these papers. I'll explain to you the nature--

Q. Can you please bring the papers in here, and let's take a look at them?

A. For example, boxes like these, I have at least 14 or 15. Cartons, this is the original carton where a person, anyone would send us the old pressure cooker to be recalled and to be exchanged.

This, we have around 34 big carton boxes, because we cut all the places in the craft paper where the sender gives us their address.

Q. May I see it?

A. Yes. To give you an example, this is one.

Q. One second, sir.

A. Yes.

MR. GOLDMAN: Can we have this marked for the record as Exhibit 1, Sandy?

THE WITNESS: You can take a copy, but I have to take that for my records, because this for me, I consider them original records.

BY MR. GOLDMAN:

Q. I understand, sir.

A. Okay.

Q. I'll tell you what, then--

MR. PAPY: Why don't you just have them run a

copy?

MR. GOLDMAN: I was going to, but maybe we will wait, because we may have a bunch of stuff to be copied.

THE WITNESS: Let me explain you the process.

MR. PADY: Wait a second. I think he wants to--

THE WITNESS: Oh, copy this.

BY MR. GOLDMAN:

Q. Yes. Go ahead, sir.

A. A person reads the ad in the newspaper, Group Brazil's address is there. So, he wraps his old pressure cooker and mails it to our address, to Group Brazil.

Q. May I ask you a question? When we are talking about the pressure cooker--

A. The recalled one. The old Rochedo non-UL, that were not UL listed, pressure cooker.

Q. And that was manufactured by?

A. Alcan Aluminio Do Brasil.

Q. Go ahead.

A. So, he wraps it, he puts it in a cardboard box, and he mails us this old pressure cooker to be exchanged.

When we receive what this gentleman mailed to

us, we cut with a scissor where the sender's address is here for our records. We put it in a box.

Then, we write a certificate of mailing, and with this certificate of mailing, we go to the post office and mail to this gentleman the brand-new pressure cooker in replacement of the old one that he mailed us.

Q. Okay. Sir, what you were just talking about, the cardboard box that you received, and then the certificate of mail, I show you a copy of two documents.

A. Yes.

Q. And this is marked exhibit, or will be marked Exhibit 1.

A. Yes.

Q. Are those two documents reflected on this copy?

A. Yes.

Q. Okay. So, you can mark this as Exhibit 1.

(Thereupon, the above-referred to document was marked as Plaintiff's Exhibit No. 1 for identification.)

BY MR. GOLDMAN:

Q. Go ahead.

A. You understood the process here?

Q. So far, so good.

A. So, for this thing, we have arranged 15 or 16.

Q. Fifteen or 16 what?

A. Plastic boxes loaded with these certificates.

Q. And about how many would you say, in your estimation, cards are there in each box?

A. Papers like this?

Q. Yes.

A. Jesus, around 6,000, 7,000.

Q. Per box?

A. No, no, no, no.

Q. A total in all the 15 or 16 boxes, about six or 7,000?

A. And perhaps a little bit more.

Q. Okay. Please continue.

A. And all the pieces of these boxes that they send us, they are also by alphabetical order in big cardboard boxes.

Q. And these are kept where?

A. I have it in my office.

Q. Okay.

A. I have a lot of them.

Q. I'll bet.

Now, can you explain about the documents that

you handed Mr. Papy and myself?

A. Yes, for instance, first I want to specify that there are three different groups of pressure cookers.

Group number one is the Rochedo pressure cooker that was not UL listed, which is the one that was recalled.

They have three item numbers, according to the capacity, and it's specified these are not UL.

Then, there is a second Rochedo brand, but it's UL listed, and it's specified here on the catalogs and on the pressure cookers and whatever, UL listed.

The item numbers are different. Instead of, for instance, for the four liters, 8042, it's 8045, 55 and 05.

Q. So, those numbers differentiate between UL and non-UL?

A. That's right. And there is a third group, that instead of being the Rochedo brand, it's the Maitre's brand, UL listed. And they have these other different item numbers.

Q. How are you so familiar with all these different models?

A. Because I used to sell them, and I still sell them. Not this one; this is discontinued.

Q. I understand.

A. But the UL listed I keep on selling.

Q. When you say this one is discontinued, we are talking about the non-UL?

A. The non-UL, that is right, yes.

Q. Very good.

A. So, this is one.

MR. PAPY: Let me interject for a second.

As far as relevance and all of those kinds of objections, do you want to give me a standing--

MR. GOLDMAN: You have got a standing objection to anything except form, and at any time you can just tell her form.

MR. PAPY: Okay.

THE WITNESS: In the group Rochedo, No. 1, inside the box, it was a knock down pressure cooker.

In other words, the handles were not assembled, like Mirror does, like Presto does.

So, inside there was a plastic bag with the different spare parts, with the handles and everything, with instructions, as well as a booklet that shows the features of the pressure cooker and instructions.

BY MR. GOLDMAN:

Q. Okay. Hang on a second. I want to get copies of these so we can mark them.

Now, when you say the spare parts that came in the plastic bag, would the gasket have been one of those plastic parts?

A. The rubber gasket?

Q. Yes.

A. Yes. Wait. The gasket was supposed to be already on the lid. Only the handles. Like the other ones. The same thing like all the manufacturers do.

Wait just one second.

When anybody would bring this or mail us, and we received this, in the new pressure cooker that we are sending back, the UL Maitre's pressure cooker, we include inside this circular, and this is a sample of this certificate of mail. And this is a sample of letter H, filed here in this box, all the addresses we have.

Q. Just for the record, may I use these copies?

A. That's for you, yes, sir, as well as that one, that's for you.

MR. GOLDMAN: Let's have these marked Exhibit 2, which Mr. Diaz indicated were samples of the certificates of mailings, copies.

THE WITNESS: Yes.

(Thereupon, the above-referred to document was marked as Plaintiff's Exhibit No. 2 for identification.)

BY MR. GOLDMAN:

Q. And what was this again, sir?

A. This is a circular letter where we explain to the customer, we call it customer, because it's Alcan's user--

Q. Right.

A. --that we are shipping the new pressure cooker. That you're going to see this pessure cooker is Maitre's, made by the same manufacturer, that the pressure cooker brand Rochedo and so forth. It's an introduction to the pressure cooker.

MR. GOLDMAN: And can we have that document marked as Exhibit 3, please?

(Thereupon, the above-referred to document was marked as Plaintiff's Exhibit No. 3 for identification.)

BY MR. GOLDMAN:

Q. Can you tell me, if you know, how the recall from the Rochedo non-UL pessure cooker came about?

A. How?

Q. Okay. I'm sorry. Strike that.

Can you tell me how Group Brazil, Inc., got

involved in the recall of the Rochedo pressure cooker?

A. Yes. As I told you, Group Brazil started operations on July 1, 1983. The corporation was created on March 1st, I believe it was, 1983, but we were just planning how to do things and organizing.

We, I mean they.

In July, when we started, we had nothing at all in the warehouse, no merchandise at all. We were just waiting for merchandise to come to the warehouse.

In August, the first shipment arrived of stationery, papers.

In September, I think that the first pressure cookers, Maitre's pressure cookers arrived to the warehouse.

On October 2nd, and I remember very well the date, was when Alcan met for the first time with a group of salesmen in the United States to create their sales forces here in the States.

They were not, and they are not my salesmen, neither Group Brazil's salesmen.

They were, and they are Alcan Aluminio Do Brasil salesmen that work also on a freelance basis, independent sales representatives.

So, what happened was, that for the first five or six months when Group Brazil started operation,

opening the warehouse, I mean, the movement was very, very poor, almost none. It was a coincidence that by November, 1983, I think it was November, 1983, I knew that a recall was about to start.

So, I said to the manufacturer, to Alcan, "The movement, the business we are generating from this warehouse, the in and outgoing merchandise is almost nothing. So, we are paying a rental here in the warehouse.

"Why don't we make the Pochedo recall here in order to save money? It would be a waste of money that you hire somebody in order to make the Pochedo recall, because it's going to cost you money."

So, with the same people we had in the warehouse, one person, period, we can take care of the recall, and at the same time we can take care of the orders that these salesmen will mail us in order to ship from this local warehouse.

Q. Okay.

A. And I said to Alcan, "I'm willing to do the recall."

It's not the first time that I have been involved, not in a recall, but in something like marketing, or sampling, or advertising.

So, I said, "I'll take charge of this recall,

and it's going to be part of our operation until the recall ends."

Q. Okay.

A. So, the whole idea started on November, yes, November, 1983--

Q. Right.

A. --before the recall was already official.

What I didn't know is all the headaches that this recall would give me later on, otherwise, I wouldn't have offered my services for sure.

Q. Let me ask you this: How did the communication between you and Alcan Brasil take place?

A. In what respect?

Q. Did you write them a letter?

A. By phone, by letters, whatever. They come here. They have an export manager that comes to the United States twice a year, three times a year.

Q. What is his name?

A. Alberto Araujo.

MR. PAPY: A-r-a-u-j-o, that's the guy?

THE WITNESS: Yes. At that time he was not the export manager. At that time there was another fellow.

BY MR. GOLDMAN:

Q. Does he have an office here?

A. No, no. He comes like all the Brazilian manufacturers.

They have export managers. They live there in Brazil, and they come to the United States to work with the salesmen or to see the market, how things are going, and that's it, to the exhibitions, to the housewares exhibitions.

Q. When he comes to the United States, Mr. Araujo--

A. Araujo, yes.

Q. --does he visit with you when he comes here?

A. He visits with me, the customers, yes.

Q. And did he back around the time of this recall?

A. Well, during this recall, the export manager was not--in November 1983, I mean, it was not Alberto Araujo. It was another gentleman.

Q. Do you remember his name?

A. Jose Roberto Aranha, A-r-a-n-h-a.

Q. Mr. Aranha?

A. Yes.

Q. Did he meet with you in the United States around the time of this recall?

A. When we started, yes.

Q. And had you met with Mr. Aranha prior to the

recall?

A. No. Wait. Aranha was here.

And I remember quite well, on November 1983, before the recall officially started, there was an announcement broadcasted, I think, by some of the radio stations here, local and perhaps in all of the United States, regarding an agreement between the Consumer Products Safety Commission and Alcan to make a recall of these non-UL pressure cookers at a future date.

We are talking about November.

Q. This is when the agreement took place?

A. That's when the agreement, the Consumer Products Safety Commission and Alcan made the agreement to make a recall.

Q. Do you know where these meetings took place, if you know?

A. I don't know. I think Washington. That's just a thought.

Q. Only if you know.

A. And that's when I said to Aranha, that we could use the warehouse, because it would be cheaper to do the recall there than to hire somebody else to pay them extra money to do the recall.

In January, the recall started, with this kind of an ad, the worst I have ever seen in my life.

MR. GOLDMAN: Can we have this marked--

THE WITNESS: That's for you, yes.

MR. GOLDMAN: --as Exhibit 4, the ad that Mr. Diaz is referring to?

(Thereupon, the above-referred to document was marked as Plaintiff's Exhibit No. 4 for identification.)

BY MR. GOLDMAN:

Q. Go ahead, tell me about the ad, Mr. Diaz.

A. The ad, I have to make some clarifications. I don't know whether the Spanish translation of that, what they were trying to say in English--I don't know what they were thinking about.

Q. We don't have to go--

MR. GOLDMAN: Go ahead, Steve.

THE WITNESS: Study for yourself.

MR. PAPY: I just want to ask him if these are all part of one ad. Maybe you want to do it. They are stapled together. For your exhibit, you may want to --

THE WITNESS: That's the circular letter or note--

MR. GOLDMAN: Hang on one second.

BY MR. GOLDMAN:

Q. I am showing you now a document. Is this the

ad that you were referring to?

A. Yes, that was published in the newspaper.

MR. GOLDMAN: Can we have this marked as Exhibit 4, please?

THE WITNESS: It was published in the newspapers.

BY MR. GOLDMAN:

Q. Which newspaper?

A. Puerto Rican newspapers, and in some major newspapers in Miami. I think that in New York. Alcan is the one that knows where this ad was published.

Q. Hold on one second.

Go ahead. Continue.

A. On January, during the first ten or 15 days, I don't remember--

Q. Is this January '84?

A. Exactly. The recall started officially with this ad, and people started coming to our address to change personally the pressure cookers.

Q. Did these people live in Miami, do you know?

A. Most of them, yes.

We had for our control two different kinds of pads, in order to register what we were receiving.

Like this, I have ten pads. I don't know. These small pads are those people that went directly,

personally to the Group Brazil address with their old pessure cooker to be exchanged.

And on these yellow pads, they were registered this, others that were mailed.

Q. Okay.

A. So, we started loading all these things, and we just gave the new pressure cookers to all of them.

In that time, Aranha resigned the company. He left. I don't know why, but he left.

And, then, Mr. Araujo took his place. As if, not export manager, as in charge of exports or whatever.

Q. Let me ask you, prior to the recall, when did you first start representing Alcan in the United States?

A. We started--not in the United States. We started selling or quoting Alcan's products in 1972.

Q. Who is we?

A. We, I mean--I always say we. I.

Q. This is not Group Brazil, Inc., but this is you as a salesman, manufacturers' rep?

A. Sales representative.

Q. When did you start representing Alcan in the United States?

A. Not in the whole United States.

Q. Just in Miami?

A. Just in the Miami area.

Q. When did that occur?

A. Well, in 1973 I came to Miami. I was living then in Puerto Rico.

And some wholesalers bought directly without any warehousing here, just from Brazil to their warehouse.

That was 1973. Yes. Minimal amount. Three hundred cookers, whatever. Nothing much.

Q. What kind of arrangements did you have, as far as your territory, if any, with Alcan Aluminio Do Brasil?

MR. PAPY: Then or now?

BY MR. GOLDMAN:

Q. I'm sorry. At the time that you came to Miami.

A. I was a manufacturers' sales representative as I am now.

Q. Was there an exclusive territory?

A. No.

Q. Do you know of other manufacturers' reps representing Alcan Aluminio Do Brasil in Miami in 1973?

A. Oh, no, I was the one.

Q. You were the only one?

A. I think so.

Q. To your knowledge?

A. (Nods head.)

Q. You had done business with Alcan in Brazil prior to your coming to Miami in '73?

A. In '72 I made business. I mean, I wrote orders for Alcan in Puerto Rico, yes.

Q. When you transacted your first business with Alcan Brasil, where did that take place?

A. In other words, as a manufacturers' sales representative?

Q. Yes.

A. In Puerto Rico.

Q. Can you tell me how those transactions went about?

A. Well--

Q. What happened between you and Alcan?

A. I was looking for lines, as I am looking now, acting as a sales representative for some other manufacturers.

I have, as usual, as all the manufacturers' sales representatives have, an order book. I write the order to the customer that is interested to buy to

Alcan, the pressure cookers or whatever.

I mail the order to the manufacturer, and the manufacturer ships to the customer.

Q. Perhaps I didn't phrase that question well, sir.

How did it come about that you had an order book from Alcan?

A. No, no, not an order book from Alcan. Myself. An ordinary order book of a sales representative, Manuel Diaz.

Q. Let me get specific: Did you ever go to Brazil to make arrangements with Alcan to sell their product?

A. To sell their product?

Q. Did you ever go down to--

A. Yes, I go to Brazil several times, yes.

Q. Before you ever sold their product?

A. Before?

Q. Yes.

A. No. It was prior to selling their products, I went to Brazil. I mean, after. Not prior, after.

Q. What I don't understand, the first time you sold Alcan Brasil products--

A. How did it happen?

Q. --how did it happen--

MR. PAPY: How did you get your initial relationship?

BY MR. GOLDMAN:

Q. My question is, I can't sell you a brand-new Buick today, because I don't have a distributorship.

A. I know what you mean, yes.

Q. Okay. So, explain that to me.

A. I was told in 1972, Alcan Aluminio asked one person in Brazil, living in Brazil, to make an exploratory trip to the Caribbean, Latin American customers, to appoint a sales representative, to get sales representatives in the territories.

And this gentleman, Eric Schmidt, I remember, he went to Puerto Rico, and he was asking for a sales representative to several wholesalers or distributors, I don't know. Somehow, and I never knew the source, somebody recommended me as a salesman.

Q. Right.

A. So, this Mr. Schmidt got in touch with me, and asked me if I wanted to be the sales representative for Alcan Aluminio, who manufacturers pressure cookers, aluminum utensils.

He showed me a sample of the pressure cooker at that time, and explained to me what Alcan Aluminio Do Brasil was, and I said, "All right, I'll represent

them."

Q. Now let's jump ahead to 1973 when you came to Miami.

A. Yes.

Q. Was that just a continuation of your relationship with Brasil, with Alcan Brasil, or did you have new arrangements at that time?

A. No. I asked them to make me--give me an opportunity to see whether the pressure cookers that I was selling in Puerto Rico, I was able to sell it somewhere in the United States.

And for me, the easiest place to come, because it's expensive to be here, living in Puerto Rico, was Miami.

And I showed the samples to prospect customers here, as well as I showed them in Puerto Rico, and I sold, I think I got two or three orders. Very scarce.

Q. When you asked them to give you that opportunity, how did that communication take place?

A. I'm not sure, but I think, "May I go and try to sell there?" They were not selling here. "May I go and try to sell them in order to see--"

Q. My question is, did you go to Brazil?

A. No, no.

Q. Did you phone them, did you write them? How did the communication take place?

A. It could have been by phone. It could have been. I'm not sure.

Q. And when you asked if you could have a chance to do that, what was their response to you?

A. "Yes, sir. You may try to sell them in the States."

Q. How long was it between when you came to Miami to sell the Alcan Brasil products for the first time until the representative from Alcan Brasil came to visit you in Miami?

A. Let me point out that in 1973 I was living in Puerto Rico. So, I was making to the States exploratory trips to see what the reaction was.

And in that time, I recall that the person that was at that time export manager met with me here. I think it was once. And I think it was 1974.

Q. Is this Mr. Aranha at that time or this is someone else?

A. Somebody else, prior to that. Mr. Chiodi, C-h-i-o-d-i.

In that time, I cannot tell you exactly whether it was 1973, 1974. I just don't remember; but he went here in order to feel the market, to see

whether there were possibilities of making a breakthrough at that time.

Q. Do you have any written agreements with Alcan Aluminio Do Brasil, either you personally, or Group Brazil, Inc.?

A. A manufacturer's sales representative cannot ask, at least that's the way I think, a contract for representation to any manufacturer, because how good is a contract, if the product you cannot sell?

So, if you cannot sell the product, you have to get something else, otherwise, you're in bad shape.

And at the same time, if you are really producing to the manufacturer, the manufacturer will think, "Why am I going to change?"

So, it's a mutual agreement, verbal agreement, gentleman's agreement, whatever.

Q. In short, is that a no? You have no written agreements?

A. No.

Q. Okay. Did you have any written agreements with them regarding the recall?

A. No. I am an old dinosaur, my friends. If things don't work right, that's it.

Q. I am certainly not questioning your judgment.

I am only trying to find out what exists.

A. When I offer--

MR. PAPY: You are not attacking the man's integrity, Marc, honesty?

MR. GOLDMAN: Hardly.

THE WITNESS: When I offered my services to do this recall, and I tell you now, if I would have known--

It's true.

BY MR. GOLDMAN:

Q. I know.

A. --all of this headache, I would shut my mouth definitely.

Q. That's okay. From the period of time, when you first came to Miami and started to sell Alcan Brasil products here, how were you paid?

A. On a commission basis always.

Q. How did you receive the payment?

A. Usually through the bank. The process is this: Alcan sends you the merchandise, let's say, $1,000 worth of merchandise. The Brazilian bank instructs the local bank, "Pay Manuel Diaz 'X' amount, $50, five percent on FOB," when you pay the customer, and the bank reimburses the $950.

Q. Do you have any records to indicate payments

you have received from Alcan Brasil at any time since you have been selling their product in the United States?

A. Oh, yes.

Q. Did you bring them with you today?

A. Today?

Q. Yes.

A. I have to go to the office and bring.

For example, a check, you mean?

Q. Any kind of records to indicate payment from Alcan to you while you sold their product here in Miami.

A. I have copy of the checks, of sales commission checks, photostatic copy.

Q. You didn't bring any of those here today?

A. No.

Q. I did ask you to, but it's all right. We are friends.

Do you also have at your office copies of your invoices or order forms that you place to them?

A. When an order is written, I send the order to the manufacturer. They ship to you, for instance, if you are the buyer. They send the original documents to the customer through the bank, and they send me a copy of that.

And, then, I attach it to the order I send, and when I receive the check, I attach it to the deposit I make in the bank.

Q. Would it be possible at a later date for me to get copies from you to show your order, invoice, and payment for particular shipments?

A. Well, not for all these years.

Q. I understand, but it would be possible to get some?

A. I have orders that I can show you any time.

Q. Good.

A. Recent orders, of course.

Q. When you came to Miami for the first time, in regards to selling the Alcan Aluminio Do Brasil products, do you know if Alcan Brasil was selling their products in the United States in other places?

A. Which products, because I think that Alcan had several products, domestic, like the pressure cookers, and they have also industrial products.

Q. Let's just talk about the pressure cooker for a moment.

A. To my knowledge, before I came here for the first time, I don't think so.

Q. Anywhere in the United States, not just Florida?

A. I don't think so; but you have to check with them, not with me.

Q. I understand. This is only to your knowledge, sir.

A. Yes. To my knowledge, no.

Q. To your knowledge, does Alcan Brasil sell their products in other areas in the United States now?

A. Today?

Q. Yes.

A. Oh, yes, they are selling to the United States. They are selling the Maitre's pressure cookers in the United States.

Q. Did you have any responsibility for Alcan starting to sell their products in other areas in the United States other than the Miami area?

A. No. Directly, no.

In other words, I gave them the idea to appoint salesmen, their salesmen, not mine or Group Brazil's, their salesmen.

And they appointed these salesmen, and I have no idea how much they are selling, but I know they are selling for sure.

Q. Do you know if there are other people such as yourself, meaning a manufacturers' sales rep, in the Miami area selling the Alcan Brasil products?

A. I hope not.

Q. You hope not. Does that mean you don't think there are?

A. No, I don't think. As a manufacturers' sales representative, no.

There are wholesalers that they are selling, but the orders, they should pass through me.

Q. How about anywhere else in Florida, does Alcan have other people such as yourself in other areas in Florida, do you know?

A. I don't think so, but I haven't been anywhere in Florida. In other words, I have not had the time to explore the market of even Fort Lauderdale. I have been taking care of this local Miami and Puerto Rico, period.

Q. Let's talk in terms of dollars and cents in the last 12 months. How much gross income, in other words total sales, do you do on behalf of Alcan Brasil in this area?

MR. PAPY: I object to the form.

THE WITNESS: In Miami? In Miami you mean?

BY MR. GOLDMAN:

Q. Yes.

A. In gross sales, you mean?

Q. Yes.

A. Not commission sales?

Q. No, gross sales.

A. In the last 12 months here, the most should be $60,000.

Q. And that would be just of Alcan Brasil products?

A. Yes.

Q. Of that--go ahead.

A. I don't understand very well your question. In other words--

Q. Let me rephrase it for you.

A. Yes.

Q. What I am trying to find out is, in the last 12 months, what is your gross sales in the Miami, Florida area?

A. As a sales representative?

Q. As a sales representative of Alcan Do Brasil products?

A. The most, and I tell you, the most should be $60,000, approximately. I cannot tell you.

Q. Of that amount, to your knowledge or in your best estimation, how much of that is pressure cooker sales?

A. I would say 99.9 percent of that amount.

Q. We have some documents here that we referred

to before, and we didn't have copies. I would like to just briefly clarify them so we could have them marked.

A. You can keep these.

Q. I understand. I need to mark them for the deposition.

(Thereupon, the above-referred to documents were marked as Plaintiff's Exhibits Nos. 5, 6 and 7, respectively, for identification.)

Q. Okay. Sir, I show you what's been marked as Exhibit 5. Could you briefly explain what that is for the record?

A. Oh, yes. When this ad was published, people started writing to that address.

Q. Excuse me. Are you referring to the ad that's been marked as Exhibit 4?

A. Yes, this one. People started writing to our address, Group Brazil's address, what this recall was about, how to mail, or to ship, or to exchange the pressure cooker.

So, Mr. Araujo wrote this circular letter mailing back an answer, instructing them how to make the exchange, to send the pressure cooker here, that we will send the other one, so forth.

Q. Okay. Where was Mr. Araujo?

A. He was here in Miami at that time.

Although this is undated, because we knew that questions would keep on coming up.

This circular letter was issued in early January when the recall just started, that people started calling us, "Give an address, send this," in order to instruct them what the recall was about.

Q. And I show you what's been marked as Exhibit 6. Could you explain what that is, please?

A. This is a picture, a copy of the poly back where the spare parts, such as the handles, were wrapped inside and put inside the pressure cooker of this old Rochedo pessure cooker.

Q. Is this a copy of some document that came in the pessure cooker?

A. No. I kept one of these plastic bags by coincidence. I have it, a plastic bag, an empty one, that the person that sent us one of these old pressure cookers, it had inside everything.

She was very neat, and she wanted to do things right, and she unassembled the cooker, and sent us the old pressure cooker.

So, I just kept it.

Q. So, in other words, this is a copy of a document that came in that plastic bag with the handle?

A. Yes, yes, that is right, yes.

Q. And we have what's been marked Exhibit 7, sir. I think you gave some testimony on that, but just please identify it for us.

A. This is--

MR. PAPY: Was this a cover sheet, originally, the first sheet?

MR. GOLDMAN: Yes.

THE WITNESS: To identify the manufacturer's name and home address, the head office address, and the phone where they have the plant, which is another different address; the person in charge of this recall, Benone Jose Lara; and the three different groups of pressure cookers, Rochedo, Maitre's.

MR. GOLDMAN: I think that's it, Steve.

CROSS-EXAMINATION

BY MR. PAPY:

Q. Mr. Diaz, are you familiar with the term independent contractor?

A. No.

Q. In your work here as a manufactures' representative, do any of the manufacturers assign you duties on a day-to-day basis?

A. No.

MR. GOLDMAN: Before you continue, I assume I have the same standing objection, so you and I won't bother.

Go ahead.

MR. PAPY: Sure.

BY MR. PAPY:

Q. In fact, do they tell you how to go about running your business at all?

A. No.

Q. When the sales orders are processed to Brazil, is the sale actually consummated in Brazil?

A. I don't follow-up.

Q. Well, the sales are shipped to Brazil, the sale orders are sent to Brazil?

A. Yes.

Q. And it's in Brazil that the decision is made whether--

A. Oh, yes.

MR. GOLDMAN: I object to the form.

THE WITNESS: Sometimes they approve and sometimes they don't.

BY MR. PAPY:

Q. When you entered negotiations concerning Brazil Group, Incorporated--

A. Group Brazil.

Q. My mistake.

--were there any negotiations with the people at the various Brazilian companies?

A. Oh, yes.

Q. And in those negotiations, did the people you deal with explain to you that they did not want to participate in any trading activity in the United States themselves?

A. Not when we started talking.

Q. Prior to operations of the warehouse involved, did they explain that to you?

A. Before that. In other words, we started thinking about this Group Brazil idea in November 1982.

Two different manufacturers invited me to go to Brazil in January 1983. I explained very clearly that I had no money at all to start a project, such as renting warehouses and so forth.

So, the first thing that was set up in Brazil, and that was 1983, was that these two manufacturers, Alcan, and the other one, Melhoramentos, the stationary, would help me to initiate operations. And this would work, Group Brazil would work as a depository for the manufacturer. That was January 1983.

I think it was in March 1983, two months later, one or two months later, when I was back to Miami, and I was asked to look for a warehouse, a good location.

So, I found this location, and I had reported what I thought was best to rent.

And in March 1983 they asked me--then, in February 1983, excuse me, they asked me to create a corporation, because they could not operate themselves, because they were foreign companies.

So, I was asked to create a corporation, Group Brazil, Incorporated. I did that on March 1st.

And later Alcan, in March, was the first one to tell me by telex that the billing, the invoicing process, perhaps it should be done by Group Brazil, and not by Alcan Aluminio Do Brasil, because that would mean that they would have business directly here, or they would be getting involved with taxes and so forth.

And besides, there was another Alcan, Alcan, U.S.A., which is different. They didn't want to create conflict between one company and another.

So, the original plan was changed, not only by Alcan, by others, three, four, five, six times. It was a mess. If I would have known that, no way ever that I would have got involved in that.

Q. Okay, sir. The answer to my question then, I guess, is that the people that you dealt with in Brazil are different companies, I think you just mentioned Alcan Do Brasil--

A. Yes.

Q. --explained to you they did not wish to be doing business directly in the United States; is that correct?

A. That they couldn't do business directly.

Q. Couldn't do?

A. Yes, because they had to ask for a special permit to the government.

To get dollars out of Brazil is not easy. They have to go to the Central Bank, or something, to request any release of dollars.

And because of that, they knew it was not very easy for them to open here without any--a lot of paperwork to order here a subsidiary or whatever.

So, they said, "We trust you. You open the corporation, and you start doing business," and that's it.

Q. Now, did any of these Brazilian companies own any interest in Group Brazil, any shares of stocks?

A. No, no.

Q. Did any of the officers or directors of any of these companies--

A. No.

Q. --serve in Group Brazil?

I mean, in other words, were they officers of Group Brazil?

A. No, no.

Q. Were you the only officer of Group Brazil?

A. I was the president of a very little company. My wife was the vice-president. One of my daughters was the secretary, and the other one was the treasurer.

Q. During your dealings with Alcan Do Brasil, that period of time from '73 to the present time, have you ever had any business relationship with Alcan Corporation, that's the American company?

A. No. The first that I had any direct contact was with Mr. Salibra.

Q. The same question regarding Alcan, Limited, the Canadian corporation?

A. No.

Q. Have you had any business dealings with them?

A. No.

Q. I notice that the ad that was marked as Exhibit 4 is in Spanish?

A. Yes.

Q. Do you know why that is, sir?

A. Why it is in Spanish?

Q. Yes, sir.

A. Because, as I told you before, 95 percent, that's just approximate figure, of the recalled pressure cookers were going to be recalled in Puerto Rico and in the Latin areas.

I don't know whether they published in English a similar text. I have nothing at all to assure you that they did or did not. You have to ask them. I think they should have or they did. I don't know.

Q. In your testimony, when you were mentioning you were acting as a representative for Alcan Do Brasil, and that you were taking orders, and then sending them to Brazil, during the entire period of time that you have taken orders on products that they have manufactured, have the sales been consummated in the same way, meaning that the decision is made in Brazil?

A. Always. Not only for Alcan, for all the manufacturers. They decide whether they can give credit regarding the prices or whatever other terms, shipping terms.

MR. PAPY: I don't have anything further.

MR. GOLDMAN: I have a couple.

REDIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Regarding the decision by Alcan Brasil whether or not a particular sale will eventually happen, after they make that decision, do they contact you?

A. Well, they contact me if they say, "No way we are going to ship this," or "This price is not approved," or "This payment term is not approved."

In other words, I mail them the order. If I receive no objection, it means that they are going to ship.

If by any chance they decide that the customer is not good enough for them, or that the prices they are requesting are not feasible, they send me--mostly by phone, "Hey, you're crazy, you cannot quote this price or give these terms."

Q. Assuming there's no objection to the order, who do they contact?

A. They just send to the customer an advice of shipping, the day they are going to ship.

Q. You were talking about the creation of Group Brazil, Inc.?

A. Yes.

11

Q. You as a manufacturers' rep sold Alcan Brasil pressure cookers; is that correct?

A. Before the--yes.

Q. And Group Brazil, Inc., as a corporation, sold Alcan Brasil pressure cookers?

MR. PAPY: Object to form.

THE WITNESS: It's not--they didn't sell. Group Brazil was created--

BY MR. GOLDMAN:

Q. Okay. I understand the whole scenario we described with option one and option two before.

My question is, is it possible that someone in the Miami area, after the creation of Group Brazil, Inc., could have bought a shipment of Alcan Brasil pressure cookers from you as a manufacturers' rep?

MR. PAPY: Objection to the form of the question, speculative.

THE WITNESS: As a manufacturers' rep?

BY MR. GOLDMAN:

Q. Yes.

A. Let's say, one customer, any customer in Miami, if they knew that they had two options, either they bought directly from the manufacturer and the shipment went directly to them through the bank, or they wanted to make a trial, a test order.

Q. I understand. Let me stop you for a second.

If a wholesaler in Miami, and this is after the creation of Group Brazil, Inc., as a corporation, wanted to buy directly from Alcan in Brazil, would they deal with you for this sale?

A. As a sales representative, yes.

MR. PAPY: Same objection.

BY MR. GOLDMAN:

Q. And if they wanted to make a trial purchase, would they have dealings through the course of that sale with Group Brazil, Inc.?

MR. PAPY: Same objection.

THE WITNESS: They would deal with Manuel Diaz, as one of the sales representatives of Alcan Aluminio.

And then Manuel Diaz would give the order to Group Brazil, and Group Brazil will deliver or would expedite that order as a depository, and at the same time, would bill to the customer.

And once the customer has paid to Group Brazil, Group Brazil would reimburse to Alcan or to any other manufacturer.

BY MR. GOLDMAN:

Q. When Group Brazil was created, you were discussing with Mr. Papy some of the foreign

manufacturers' interest in the creation?

A. (Nods head.)

Q. Who was interested in the creation of Group Brazil?

A. The idea was born here in Miami while one of the directors of Melhoramentos, the stationary--

Q. Right.

A. --dropped by. And we talked in my house, and he asked me how to make things move faster, or how to make a faster breakthrough in this market, because it was hard for them to quote direct prices, FOB prices, Puerto Santos, and so forth, to American buyers, especially to chain department stores and so forth.

Q. Was Alcan Aluminio Do Brasil involved in the suggestion to create Group Brazil, Inc.?

A. No.

MR. PAPY: Object to the form.

THE WITNESS: No. In this first conversation regarding creating a warehouse here was between Dr. Murilo.

BY MR. GOLDMAN:

Q. Did you have any conversation or communications with anyone at Alcan Aluminio Do Brasil about the creation of Group Brazil, Inc., prior to its creation?

A. Prior to the creation of the corporation?

Q. Yes.

A. Oh, yes. When Murilo and I talked about having a warehouse that would help their merchandise make a breakthrough here, I said, "It would be good to ask other manufacturers to join this idea, and it would be better that six or seven would participate in this project than one alone, because then the expenses would be split in six different parts instead of one."

Q. What was the result of your communications with Alcan Brasil regarding the creation of Group Brazil, Inc.?

A. When Murilo went back, Dr. Murilo went back to Brazil in November, I said to him to speak with some other manufacturers. He mentioned Alcan would be ideal for this.

He went back to Brazil. He spoke with the manager of this division in Brazil at that time. He also resigned, and there's a new one.

And this other gentleman, Ingo Schmidt, he liked the idea.

So, on January, 1983, they asked me to go to Brazil to explain more what I was thinking about.

Q. Who is they?

A. Alcan and Melhoramentos. They both invited me to go over there and explain about this project we had in mind. We, because it's Murilo's and mine.

Q. You said that you had thought it would be a good idea if several manufacturers participated?

A. Yes.

Q. Could you explain what you mean by participated?

A. The original idea was to set up a warehouse here.

Let's say that its fixed expenses per month, rental, electricity, and all the utilities, whatever, would be, let's say, $5,000, $6,000 per month.

The original idea was to create a petty cash fund by all the manufacturers that would participate in this project, and to give me some advance money as a petty cash fund, and once the money is exhausted, I would mail them the receipts, and they would reimburse me.

And, in other words, that the expenses, the monthly expenses of this project would be sponsored by all in even parts, in even shares, whatever.

Q. Did this participation plan eventually come into being? Did manufacturers participate in this petty cash fund that you just described?

A. At the beginning, they all say yes, but later, these legal technicalities, which I don't know, they say it was not possible for them to participate in that that way, because they would have to subscribe themselves as foreign business partners or whatever. I don't know. And, so, they changed the whole procedure.

Q. Okay. When the procedure was changed, was Alcan Brasil one of the ones who changed it?

A. Oh, yes.

Q. Okay. And did Alcan Brasil, or a representative of Alcan Brasil speak to you about how they wanted to change the program for Group Brazil, Inc.?

A. Yes.

Q. And you stated before there were some billing and shipping changes. Were those instituted by Alcan Brasil?

A. I don't know who instituted that, but they instituted them.

Q. Did Alcan Brasil in fact make billing and shipping changes from the original arrangements?

A. Well, from the original project, yes. In other words, they never--before we started functioning as a warehouse, as Group Brazil, everything was changed.

Q. Did someone from Alcan Brasil explain to you, and not through anybody else, is what I am saying, did you talk to someone from Alcan Brasil about the problems that they thought they were facing, and why they wanted to make these changes?

A. Oh, yes.

MR. PAPY: Object to form.

THE WITNESS: Yes.

BY MR. GOLDMAN:

Q. So, after you had this conversation, did someone from Alcan Brasil tell you how they wanted you to go about it so you could do the business here?

MR. PAPY: Same objection.

THE WITNESS: (Nods head.)

BY MR. GOLDMAN:

Q. Can you answer out loud?

A. Yes.

Q. Okay. Just one last brief line.

You mentioned to Mr. Papy that your knowledge of Alcan Corp., and Alcan, Limited, is from your contact with Mr. Salibra; is that right?

A. When the recall started, Mr. Salibra came to Miami to meet with Mr. Aranha before the recall started. That was November. To explain to him, because he was in transit here, about the procedures,

the announcement that a recall is going to be made in a future date, and that he wanted to know the concentration, the distribution concentration areas in order to publish this ad.

Q. Who wanted to know?

A. Mr. Salibra. Who else?

Q. That's okay.

A. Well, one of them. That's when I met Mr. Salibra.

Q. Did Mr. Salibra meet with you at the same time he met with Mr. Araujo?

A. Aranha. Araujo came later. Yes, sir.

They asked me to find out or to give them approximate percentage of distribution per area, and I answered just like that, 90 percent should be Puerto Rico, and the other ten percent should be in the Latin areas of New York, New Jersey, Miami or Chicago. Wherever there's a Latin area, big concentration, pressure cookers are sold.

Q. Who did Mr. Salibra tell you he was when he met with you?

A. The attorney of--

MR. PAPY: Objection to form.

THE WITNESS: --of Alcan Aluminum Corporation, I think.

MR. GOLDMAN: That's it.

MR. PAPY: Two questions.

RECROSS-EXAMINATION

BY MR. PAPY:

Q. The procedure that you just discussed with Mr. Goldman concerning the changes instituted, were those procedures changed prior to the warehouse actually beginning operation?

A. Yes. And, then--

Q. Pardon?

A. The first changes prior.

Q. Okay.

A. And the other changes, later.

Q. Okay.

MR. GOLDMAN: Can you let him finish? The other changes when?

THE WITNESS: Later.

BY MR. PAPY:

Q. Which changes, what changes are you talking about as far as time to time?

A. Well, prior--

Q. Let me ask you this: I believe earlier when I asked you a question, you said that prior to the opening of the warehouse, it was communicated to you that because of legal reasons these companies did not

want to be doing business in the United States; is that correct?

A. (Nods head.)

MR. GOLDMAN: Object to the form.

BY MR. PAPY:

Q. And wasn't it those times that they instituted procedural changes regarding the doing business at the Group Brazil warehouse?

A. In those times? Pardon me?

MR. GOLDMAN: Object to the form.

BY MR. PAPY:

Q. Yes, sir, at that time, at the time that they communicated to you their concerns, and that they didn't want to be doing business in the United States, was it at that time that the procedural changes were implemented concerning the Group Brazil warehouse?

A. Well, the first changes were made in March, three months--March, yes, three months before or four months before the warehouse was opened or even rented.

Q. And what were those changes, sir?

A. Number one, that they didn't want to establish a petty cash fund and follow the suggestion that this would be worked as a depository for different manufacturers, and the expenses would be shared evenly by all participants.

Q. Right. Any other changes at that time?

A. The invoicing process, I told them that in order to simplify things and to make expenses lower, the best way is that each manufacturer would make their own billing, their own invoicing.

That way, number one, they would have control of the invoicing, of the sales, of the inventory which runs well here, is saleble, which is not in their office, and at the same time would save a lot of clerical work here in the warehouse.

By doing this, by keeping the control, each manufacturer involved in this project, we could handle the whole warehouse with one man. That would be the one to receive and to ship. And our only job would be to send proof of shipping.

And, then, the manufacturer would bill the customer directly, and we had nothing to do about-- nothing else to worry about than receiving merchandise and shipping.

Q. May I interject?

A. Yes.

Q. Were those changes that you suggested or changes that they suggested?

A. They suggested, not me.

Q. Okay. Were there any others at that time?

A. In March was Melhoramentos. In March, 1983. And a third manufacturer--

Q. That's neither Alcan nor--

A. No. The third one to join the project in September was Klimmek. He manufacturers brooms and brushes.

MR. GOLDMAN: That's okay. We don't care about him.

THE WITNESS: You don't, but I do.

BY MR. PAPY:

Q. Sir, could you tell me what that is?

A. When that ad was published--

Q. When this ad, sir?

A. No, no. That's a different one. When the other ad, this one.

Q. This ad, sir?

A. Retirando, retiring.

MR. GOLDMAN: Exhibit No. 4?

THE WITNESS: Yes.

MR. GOLDMAN: It's the same thing, isn't it?

MR. PAPY: That's claiming. It's the same mess.

MR. GOLDMAN: Let's do this.

THE WITNESS: Let me explain.

MR. GOLDMAN: Hold on a second before you

explain.

Let's mark that as 8, that one as 9, and then we will get it clear. Let her mark them.

(Thereupon, the above-referred to documents were marked as Plaintiff's Exhibits Nos. 8 and 9, respectively, for identification.)

THE WITNESS: When I saw this ad in the newspaper--

BY MR. PAPY:

Q. All right, sir. Now, you are referring to--

A. 8.

Q. Exhibit No. 8?

A. Yes. And I read the ad, I phoned Brazil to ask who was the person to draft this text.

Q. Which text is this, sir?

A. This one, Exhibit No. 8. Because here they say, and I'll translate for you, "Retiring from the market pressure cookers; Brand, Rochedo." Rochedo brands.

Q. Let me ask you a question here, sir. I am looking at--

A. That's different. This other was--

Q. Is this, that's No. 9--

A. Yes.

Q. --the ad that's also reproduced on No. 8?

A. No.

Q. Is the one that's No. 4 the ad that's also reproduced on No. 8?

A. Yes, No. 4 is the one reproduced on No. 8.

Q. Regarding the right half of exhibit No. 8?

A. I made it.

MR. GOLDMAN: Hold on one second.

Go off the record.

(Discussion held off the record.)

BY MR. PAPY:

Q. The right half of Exhibit No. 8?

A. I made that.

Q. You printed that up?

A. Yes, sir.

Q. And what did you do with this?

A. Explained what this ad should have said.

Q. This is something that you sent?

A. I sent it.

Q. To Alcan Do Brasil?

A. All customers in Puerto Rico. Of course, also to Alcan Do Brasil.

Q. Did you do anything with it in Miami, these instructions?

A. No. No, to Puerto Rico only, because that was the strongest market of the Rochedo brand pressure

cookers.

And when this ad was published, competition, all other salesmen of pressure cookers started going around customers with the ad. "These guys are in bad shape." And they started trying to make a profit out of this bad ad.

So, when I knew about it, and all customers started telling me about competition, what they were doing, I wrote a circular letter, such as this one, I mean, whatever, clarifying all the mistakes I think that they made when they made this draft.

Number one, we are not retiring from the market. We are making an exchange of the non-UL pressure cookers by the UL listed pressure cookers.

Q. All right, sir. That's fine. We were just trying to identify it. Thank you.

MR. GOLDMAN: Can you just ask him, did 9 come out after that?

THE WITNESS: When I said all this, and I told Alcan that this was the worst thing I have ever seen in my life, Mr. Manuel Santiago, he used to work in--what was the word--wait--public relations, or something.

MR. GOLDMAN: For?

THE WITNESS: For Alcan Aluminum Corporation.

That they would make another draft improving or clarifying this thing.

So, the only thing that--I haven't checked yet, but I think that they only changed the first word from retiring to claiming.

So, I don't know whether this new ad was published at all or not. I didn't even--I thought it was not even worth it to check in the newspapers. I just forgot about the ads.

So, if they published--they changed, because I think that they published the ad for one, or two, or three consecutive months in order to announce the recall.

I don't know if in that period they changed this ad for this other ad. For me, it's the same thing.

MR. GOLDMAN: Steve, do you have anything else? Can I ask one last thing?

MR. PAPY: Yes.

REDIRECT EXAMINATION

BY MR. GOLDMAN:

Q. You said Mr. Santiago worked for Alcan Aluminum Corp.?

A. I think so. I don't know. Ask them. He was the one that told me that they were going to change

this one ad to another.

Q. To your knowledge, then, Mr. Santiago worked for the American Alcan Corporation, isn't that what you said?

A. I'm not 100 percent sure, but--

Q. To the best of your knowledge?

A. To the best of my knowledge, yes.

MR. GOLDMAN: Okay. I'm done.

RECROSS-EXAMINATION

BY MR. PAPY:

Q. When did you say you met with Mr. Santiago?

A. I met him once in Group Brazil. He went--when all this recall started in January, I think that he went--he visited us there once, to see how this recall and all this recalling process was being done.

MR. PAPY: I don't have anything else at this time. I don't have any questions.

THE COURT REPORTER: Do you want a copy if it's typed?

MR. PAPY: Yes, ma'am. If he is going to order it, I will take a copy.

MR. GOLDMAN: Let's go on the record.

I would like a document that was handed to me at the end of the deposition by Mr. Diaz to be marked as Exhibit 10, and it's a letter on the

letterhead of Alcan Aluminum Corporation.

This was not produced to plaintiff's counsel until the end of the deposition. I just received it now.

(Thereupon, the above-referred to document was marked as Plaintiff's Exhibit No. 10 for identification.)

MR. PAPY: I would like to put something on, and that is, the letter was part of the initial packet that Mr. Diaz was good enough to provide to both counsel, and prior to the deposition's conclusion, Mr. Goldman had ample opportunity to ask questions concerning that document.

(Thereupon, the taking of the deposition was concluded and reading, signing and notice of filing were waived.)

- - - - -

CERTIFICATE

STATE OF FLORIDA)
: SS.
COUNTY OF DADE)

I, the undersigned authority, hereby certify that the foregoing transcript, pages 1 through 68, inclusive, is a true and correct transcript of the deposition of MANUEL SOSA DIAZ, taken before me at the time and place stated in the caption thereof.

I further certify that said witness was duly sworn according to law.

I further certify that reading, signing and notice of filing were waived.

I further certify that I am not of counsel to any of the parties to said cause or otherwise interested in the event thereof.

IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal of office this 4th day of June, 1986.

Sandra Lish
SANDRA LISH,
Notary Public in and for the
State of Florida at Large.

My Commission Expires:
April 17, 1989.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CIVIL DIVISION

CASE NO. 85-2729 CIV-Scott

Florida Bar No. 525420

LUCRECIA HERNANDEZ,

Plaintiff,

vs.

ALCAN ALUMINIO DO BRASIL S.A.; et al.,,

Defendant.

_____/

MOTION FOR REMAND

COMES NOW the Plaintiff, LUCRECIA HERNANDEZ, by and through the undersigned attorneys, and hereby moves this Court to remand the within cause to the State Court from which it was removed and in support thereof states:

1. This action was originally filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

2. Subsequent to the filing, the Defendants removed said action to this Court.

3. That based on the Affidavit of the Plaintiff, LUCRECIA HERNANDEZ, which has been filed with this Court, damages in this matter are not in excess of Ten Thousand Dollars ($10,000.00) and therefore this Court lacks subject matter jurisdiction.

4. Pursuant to Title 28 U.S.C. Section 1447(c), this Court should remand this case to the State Court in which it was originally filed.

WHEREFORE the Plaintiff prays this Court grant her Motion and enter an order remanding this cause to the Circuit Court in and for the Eleventh Judicial Circuit of Dade County, Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed on this 18 day of September, 1986 to: LAWRENCE A. SALIBRA, ESQ., at Peter Miller, Esq., 100 Erieview Plaza, Twenty Ninth Floor, Cleveland, Ohio, 44114 and STEPHEN A. PAPY, ESQ., at Papy, Poole, Weissenborn & Papy, 201 Alhambra Circle, Suite 502, Coral Gables, Florida 33134.

STABINSKI & FUNT
Attorneys for Plaintiff
Third Floor
757 N.W. 27th Avenue
Miami, Florida 33125-3093
Telephone: 643-3100

BY: MARC L. GOLDMAN, ESQ.

(49.37)

LUCRECIA HERNANDEZ,

Plaintiff,

v.

ALCAN ALUMINIO DO BRASIL S.A.; et al.,

Defendants.

_____/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-2729-CIV-SCOTT

ORDER (1) GRANTING MOTION FOR RECONSIDERATION CONCERNING MR. SALIBRAS' ADMISSION PRO HAC VICE AND (2) GRANTING MOTION FOR REMAND

FILED by _____ D.C.
OCT - 3 1986
CLERK U.S. DIST. CT.
S.D. OF FLA. MIAMI

UPON CONSIDERATION of the Defendants' Motion for Reconsideration and the Plaintiff's unopposed Motion for Remand, it is

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Reconsideration of Mr. Salibras' motion for Admission Pro Hac Vice is **GRANTED.**

2. Plaintiffs' unopposed Motion for Remand is **GRANTED.**

DONE AND ORDERED in Chambers at Miami, Florida on the 2nd day of October, 1986.

THOMAS E. SCOTT
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

OCT 9 1986

APPENDIX C

Supreme Court of Florida

TUESDAY, JUNE 21, 1988

ALCAN ALUMINIO DO BRASIL, S.A., et al.,	*	
Petitioners,	*	CASE NO. 72,602
v.	*	District Court of Appeal, 3d District - Nos. 87-1697
LUCRECIA HERNANDEZ,	*	
Respondent.	*	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST
Sid J.
Clerk Supreme Court

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Joseph P. Farina, Judge
Hon. Richard P. Brinker, Clerk

Lawrence A. Salibra, II, Esquire
Marc L. Goldman, Esquire
Sheridan K. Weissenborn, Esquire

JUN 23 1988

NO. 87-477

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

Now comes Marc L. Goldman, being first duly sworn according to law, states and deposes as follows:

1. That he has personal knowledge of the facts contained herein.

2. That he is the attorney for the Respondent, LUCRECIA HERNANDEZ, in the above-captioned case.

3. That this Affidavit is being provided to the United States Supreme Court, Clerk of Courts, pursuant to Supreme court Rule 28.2

4. That on or about September 30, 1988, the Brief in Opposition to the Petition for Writ of Certiorari, for the above-mentioned case, was shipped by United States Express Mail to the Clerk of Courts for the United States Supreme Court, at 1 First Street, Northeast, Washington, D.C. 20543.

5. That said Brief in Opposition to the Petition for Writ of Certiorari is being filed within the permitted time, which is thirty (30) days after the receipt of the Petition for Writ of Certiorari.

6. That said Brief in Opposition to the Petition for Writ

of Certiorari was mailed to: **Lawrence A. Salibra, II, Esq.**, 1301 East 9th Street, 29th Floor, Cleveland, Ohio, 44114.

Respectfully submitted,

STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125-3093
Telephone: (305) 643-3100

By: MARC B. GOLDMAN, ESQ.

SWORN TO AND SUBSCRIBED before me this 30th day of September, 1988

NOTARY PUBLIC, State of Florida

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV 25,1989
BONDED THRU GENERAL INS. UND.

(5464CERT)

NO. 88-557

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

MOTION FOR LEAVE TO APPEAR PRO HAC VICE
TO THE UNITED STATES SUPREME COURT

MARC L. GOLDMAN, ESQ.
STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125
(305) 643-3100

MOTION FOR LEAVE TO APPEAR PRO HAC VICE
TO THE UNITED STATES SUPREME COURT

I, Marc L. Goldman, ask the Court for leave to appear pro hac vice on behalf of my client, LUCRECIA HERNANDEZ. I meet all the requirements to practice in this Court except that I have not been a member of a state bar for three (3) years. On January 16, 1989, I will be a member of the Florida Bar for three (3) years. I meet all other requirements. I am a member in good standing of the Florida Bar. I am admitted to practice in the Eleventh Circuit Court of Appeals; I am also a member of the United States District Court Bar for the Southern District of Florida, as well as the United States District Court Trial Bar for the Southern District of Florida. No other member of my firm has been admitted to practice in the Supreme Court. Therefore, if I am not able to proceed with this matter in the Supreme Court, my client will be unduly prejudiced. It is my complete intention to apply for admission to this Court as soon as I am eligible, January 17, 1989.

Respectfully submitted,

STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125-3093
Telephone: (305) 643-3100

MARC L GOLDMAN

By: MARC L. GOLDMAN, ESQ.

(5464MOT.1)

NO. 88-257

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

Now comes Marc L. Goldman, being first duly sworn according to law, states and deposes as follows:

1. That he has personal knowledge of the facts contained herein.

2. That he is the attorney for the Respondent, LUCRECIA HERNANDEZ, in the above-captioned case.

3. That this Affidavit is being provided to the United States Supreme Court, Clerk of Courts, pursuant to Supreme court Rule 28.2

4. That on or about September 30, 1988, the Motion for Leave to Appear Pro Hac Vice to the United States Supreme Court, for the above-mentioned case, was shipped by United States Express Mail to the Clerk of Courts for the United States Supreme Court, at 1 First Street, Northeast, Washington, D.C. 20543.

5. That said Motion for Leave to Appear Pro Hac Vice to the United States Supreme Court is being filed, along with the appropriate substantive document, within the permitted time, which is thirty (30) days after the receipt of the Petition for Writ of Certiorari.

6. That said Motion for Leave to Appear Pro Hac Vice to the United States Supreme Court was mailed to: Lawrence A.

Salibra, II, Esq., 1301 East 9th Street, 29th Floor, Cleveland, Ohio, 44114.

Respectfully submitted,

STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125-3093
Telephone: (305) 643-3100

By: MARC L. GOLDMAN, ESQ.

SWORN TO AND SUBSCRIBED before me this 30th day of September, 1988

NOTARY PUBLIC, State of Florida

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV 25,1989
BONDED THRU GENERAL INS. UND.

(5464CERT.3)

NO. 88-887

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

MOTION FOR ATTORNEY'S FEES AND COSTS
TO THE SUPREME COURT OF THE STATE OF FLORIDA

MARC L. GOLDMAN, ESQ.
STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125
(305) 643-3100

MOTION FOR ATTORNEY'S FEES AND COSTS

Pursuant to Title 28 U.S.C. Section 1927, the Respondent in the above matter asks the Court for an award of excess costs, expenses, and attorney's fees incurred because of Petitioner's unreasonable and vexatious conduct as established by the following facts.

1. Petitioner has improperly attempted to invoke the Supreme Court's jurisdiction under Title 28 U.S.C. Section 1254.

2. Petitioner, with its vast resources, has actively sought to extend the already protracted litigation in this matter against a destitute Respondent and its counsel, a small firm.

3. Due to its frivolous conduct, Petitioner has wasted the time and money of Respondent and Respondent's counsel, as well as the time and expense of all the courts through which Petitioner has dragged this matter.

4. Petitioner's argument is devoid of merit.

5. Petitioner is or should be well aware that this Court is without jurisdiction to hear this matter.

Respectfully submitted,

STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125-3093
Telephone: (305) 643-3100

MARC L GOLDMAN

By: MARC L. GOLDMAN, ESQ.

(5464MOT.2)

NO. 88-[illegible]7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,

Petitioner,

vs.

LUCRECIA HERNANDEZ,

Respondent.

Now comes Marc L. Goldman, being first duly sworn according to law, states and deposes as follows:

1. That he has personal knowledge of the facts contained herein.

2. That he is the attorney for the Respondent, LUCRECIA HERNANDEZ, in the above-captioned case.

3. That this Affidavit is being provided to the United States Supreme Court, Clerk of Courts, pursuant to Supreme court Rule 28.2

4. That on or about September 30, 1988, the Motion for Costs and Attorney's Fees, for the above-mentioned case, was shipped by United States Express Mail to the Clerk of Courts for the United States Supreme Court, at 1 First Street, Northeast, Washington, D.C. 20543.

5. That said Motion for Costs and Attorney's Fees was

mailed to: **Lawrence A. Salibra, II, Esq.**, 1301 East 9th Street, 29th Floor, Cleveland, Ohio, 44114.

Respectfully submitted,

STABINSKI & FUNT
Attorneys for Respondent
Third Floor
757 Northwest 27th Avenue
Miami, Florida 33125-3093
Telephone: (305) 643-3100

BY: MARC L. GOLDMAN, ESQ.

SWORN TO AND SUBSCRIBED before me this 30th day of September, 1983.

NOTARY PUBLIC, State of Florida

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV 25,1989
BONDED THRU GENERAL INS. UND.

(5464CERT.2)

Supreme Court, U.S.
FILED
OCT 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-387

IN THE

Supreme Court of the United States

October Term, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,
Petitioner,

vs.

LUCRECIA HERNANDEZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 29th Floor
Cleveland, Ohio 44114
(216) 523-6918
Counsel of Record for Petitioner
Alcan Aluminio do Brasil, S.A.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

Rule 22.5

This *Reply Brief to Brief in Opposition to Petition for Writ of Certiorari* has been filed pursuant to Supreme Court Rule 22.5. This *Reply Brief* addresses arguments first raised in the Respondent's *Brief in Opposition.*

TABLE OF CONTENTS

Rule 22.5 Statement I

Table of Authorities..... III

Reply Brief 1

I. This Court Has Jurisdiction Over This Action 1

II. Respondent Is Incorrect That There Are No Substantial Issues In This Case..... 3

III. Petitioner's Assertion That The Florida Courts Acted Improperly By Not Preparing An Opinion Is Predicated On Two Bases:

(A) The Need To Evaluate Which Activities Will Or Will Not Lead To The Imposition Of Jurisdiction.

(B) The Lack Of An Opinion By The Florida Appellate Court Makes A Proper Review Of This Case, In Light Of Other Relevant Decisions, Extremely Difficult. 6

TABLE OF AUTHORITIES

Case Law:

Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County, 107 S. Ct. 1026 (1987) 3,4,5

Dade County Classroom Teacher's Association, Inc. v. Rubin, 238 So. 2d 284, 289 (Fla. Sup. Ct. 1970) . 2

Ferguson v. Brogan, 149 So. 772 (Fla. Sup. Ct. 1933) 2

Jenkins v. State of Florida, 385 So. 2d 1356 (1980) 7

Maschinenfabrik Seydelmann v. Altman, 468 So. 2d 286 (Fla. Dist. Ct. App. 1985) 4

Rogers v. State ex rel. Board of Public Instruction, 23 So. 2d 154 (Fla. Sup. Ct. 1945) 2

Sanders v. State ex rel. D'Alamberti, 90 So. 455 (Fla. Sup. Ct. 1921) 2

Statutes:

28 U.S.C. Section 1254 2

28 U.S.C. Section 1257 2

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-387

ALCAN ALUMINIO DO BRASIL, S.A.,
Petitioner,

vs.

LUCRECIA HERNANDEZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

I. THIS COURT HAS JURISDICTION OVER THIS ACTION.

Respondent argues that this Court does not have jurisdiction. Respondent is correct in asserting that Petitioner's opening brief incorrectly identifies the basis

for jurisdiction. Jurisdiction is predicated on 28 U.S.C. Section 1257, not on 28 U.S.C. Section 1254, as specified in the Petition.

Respondent recognized the error and argued that there is no jurisdiction under 28 U.S.C. Section 1257 because the order of the Florida courts is not final. Although the jurisdictional issue does not resolve the litigation, it does finally determine the jurisdictional issue. Contrary to the assertion of the Respondent, having appealed the jurisdictional issue, the matter cannot be raised again at the conclusion of the litigation. *Dade County Classroom Teacher's Association, Inc. v. Rubin*, 238 So. 2d 284, 289 (Fla. Sup. Ct. 1970) citing: *Rogers v. State ex rel. Board of Public Instruction*, 23 So. 2d 154 (Fla. Sup. Ct. 1945); *Ferguson v. Brogan*, 149 So. 772 (Fla. Sup. Ct. 1933); *Sanders v. State ex rel. D'Alemberti*, 90 So. 455 (Fla. Sup. Ct. 1921).

II. RESPONDENT IS INCORRECT THAT THERE ARE NO SUBSTANTIAL ISSUES IN THIS CASE.

Respondent argues that there are no significant issues of public policy in this case. Respondent predicates that proposition on a series of facts from a deposition transcript. Respondent's reliance on those facts is misplaced since there was no finding by the trial court that the facts asserted by the Respondent were true or that those facts were a basis for its decision.

The only findings of fact were made in the federal action. There the court found that Petitioner "sold its products to a Miami contractor." (See Appendix A9 of Petition for Writ of Certiorari.) It also found that it contracted with the "same independent contractors" to institute its recall campaign. *Id.* Thus the Respondent's recitation of facts from a deposition in this case as a basis for its arguments is inappropriate since the only trial court to have explicitly ruled on the matter apparently rejected those facts as untrue and/or unnecessary as a basis for its decision. That decision predated this Court's ruling in *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County,* 107 S. Ct. 1026 (1987). The Florida courts made no findings.

The Respondent's second basis for arguing that this case presents no novel issues is to argue the merits of the case. In doing so, the Respondent misstates a number of important facts. For example, Respondent attempts to distinguish the case of *Maschinenfabrik*

Seydelmann v. Altman, 468 So. 2d 286 (Fla. Dist. Ct. App. 1985), by saying that Seydelmann sold its products:

> [t]o a third party and Seydelmann had no control after the sale of the products. Seydelmann had no agent, salesman, or distributors in Florida.

Respondent's Brief in Opposition, at page 13.

In fact, the court in *Seydelmann* recognized that, contrary to Respondent's representation, Seydelmann did have a 22 year relationship with a Florida distributor, Reiser:

> Seydelmann manufactured grinders for sale in international commerce. For at least twenty-two years Seydelmann sold grinders to an American distributor for resale in the United States. Twenty-three grinders have been resold by the distributor for use in Florida. The total sale price of the twenty-three grinders sold to Florida users is approximately $750,000 and one may infer some indirect economic benefit to Seydelmann. . . .

Seydelmann, supra, 468 So. 2d 289.

In light of the fact that the total value of the Seydelmann sales is more than double the value of the Petitioner's sales and the Seydelmann relationship with Reiser was more than double the length of Petitioner's relationship with Diaz, who was a broker, not a distributor, Respondent's assertion that *Seydelmann* is distinguishable is without merit.

For this Court's convenience, Petitioner has included in the Appendix to its Petition both the briefs filed in the Florida state courts (A27-A36 & A37-A47) and its brief as Amicus Curiae in *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano*

County, supra, at 2, (A51-A65). These briefs address the substantive arguments of the Petitioner in detail. Reference to these materials will demonstrate to this Court that the issues raised by this case can be the object of significant legitimate dispute, and should be explicitly resolved by this Court to provide the necessary law to foreign nationals who believe they are engaging in international commerce and surprisingly find themselves haled into a tribunal in the United States.

III. PETITIONER'S ASSERTION THAT THE FLORIDA COURTS ACTED IMPROPERLY BY NOT PREPARING AN OPINION IS PREDICATED ON TWO BASES:

(A) THE NEED TO EVALUATE WHICH ACTIVITES WILL OR WILL NOT LEAD TO THE IMPOSITION OF JURISDICTION.

(B) THE LACK OF AN OPINION BY THE FLORIDA APPELLATE COURT MAKES A PROPER REVIEW OF THIS CASE, IN LIGHT OF OTHER RELEVANT DECISIONS, EXTREMELY DIFFICULT.

Respondent asserts that Petitioner improperly argued that the Florida court's failure to issue an opinion as a basis for its decision is without merit. Petitioner respectfully disagrees.

Petitioner is being asked to defend a case involving less than $10,000 in a foreign country for a product it manufactured, sold and delivered in its own country. It is only fair that it be explicitly told what the basis is for that decision. Even if this Court were to find jurisdiction, Petitioner would be in a position to determine exactly what criteria it should apply in determining whether transactions taking place solely in another country will subject it to U.S. jurisdiction.

Moreover, a reasoned opinion is the only fair basis for review. This fact was recognized by the Florida Supreme Court when it declined to exercise jurisdiction because the absence of an opinion from the intermediate appellate court made such a review impossible. The

Florida Supreme Court, in the case of *Jenkins v. State of Florida*, 385 So. 2d 1356 (1980), the case cited for declining to exercise jurisdiction, set forth as follows:

> [W]e hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court.

Id. 385 So. 2d 1341.

WHEREFORE, for the reasons set forth herein and in the *Petition for Writ of Certiorari*, the Petitioner requests that the Supreme Court issue an Order granting Certiorari, notwithstanding the Respondent's *Brief in Opposition*.

Respectfully submitted,

LAWRENCE A. SALIBRA, II
100 Erieview Plaza, 29th Floor
Cleveland, Ohio 44114
(216) 523-6918
Counsel of Record for Petitioner
Alcan Aluminio do Brasil, S.A.